Supreme Court, U.S.
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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

v.

LANCELOT ARMSTRONG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

****

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Question Presented

Whether the FSC decision finding a *de facto* per se harmful error based on a violation of Johnson v. Mississippi is contrary to this Court's pronouncements in Johnson; and misapplies principles enunciated in Sochor v. Florida; Clemons v. Mississippi; Stringer v. Black; Romano v. Oklahoma; Zant v. Stephens; Dowling v. United States?

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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

v.

LANCELOT ARMSTRONG,

Respondent.

OPINION BELOW

The opinion below is reported as Armstrong v. State, 862 So.2d 705 (Fla. 2003).

Petitioner's appendix contains the opinion of the Florida Supreme Court in (A-13-A-44), petitioner's motion for rehearing (A-2-A-12), and the order denying rehearing.(A-1)[1]

JURISDICTION

The decision below, resolving Respondent's federal claim that he was denied a fair and reliable sentencing proceeding was entered on October 30, 2003. On December 19, 2003, the Florida Supreme Court denied the State's Motion for Rehearing.

[1] The symbol "A" followed by the appropriate page number expresses a citation to the materials contained in the Appendix to this pleading. The symbol "SR-ROA" references the record on direct appeal. The symbol "PCR" references the postconviction record.

Jurisdiction of this Court is timely invoked pursuant to 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the Eighth Amendment of the United States Constitution is involved.

The Eighth Amendment is applicable to the States through the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

The Florida Supreme Court recounted the facts adduced at trial as follows:

The record reflects the following facts. In the early morning hours of February 17, 1990, Armstrong called a friend and asked him to go with him to rob Church's Fried Chicken restaurant. The friend refused. According to several employees of Church's, around two o'clock that same morning, Armstrong and Michael Coleman came to the restaurant asking to see Kay Allen, who was the assistant manager of the restaurant and Armstrong's former girlfriend. The restaurant employees testified that Allen did not want to see Armstrong and asked him to leave. Armstrong and Coleman, however, remained at the restaurant and eventually Allen accompanied Armstrong to the vehicle he was driving while Coleman remained inside the restaurant. The employees additionally testified that Allen and Armstrong appeared to be arguing while they were sitting in the vehicle.

Allen testified that, while she was in the car with Armstrong, he told her he was going to rob the restaurant, showed her a gun under the seat of the car, and told her he might have to kill her if she didn't cooperate. Coleman then came out to the car, and Armstrong, Coleman, and Allen went back into the restaurant.

Allen was responsible for closing the restaurant, and by this time, the other employees had left. Coleman and Armstrong ordered Allen to get the money from the safe. Before doing so, she managed to push the silent alarm. Shortly thereafter, Armstrong returned to the car. Coleman remained in the restaurant with Allen to collect the money from the safe.

Other testimony reflected the following facts. When the alarm signal was received by the alarm company, the police were notified and Deputy Sheriffs Robert Sallustio and John Greeney went to the restaurant where they found Armstrong sitting in a blue Toyota. Greeney ordered Armstrong out of the car and told him to put his hands on the car. After Greeney ordered Armstrong to put his hands on the car, Greeney holstered his gun to "pat down" Armstrong. Sallustio then noticed movement within the restaurant, heard shots being fired from the restaurant and from the direction of the car, and felt a shot to his chest. Apparently, when the movement and shots from the restaurant distracted the officers, Armstrong managed to get his gun and began firing at the officers.

According to Allen, when Coleman noticed that police officers were outside the building, he started firing at the officers. Allen took cover inside the restaurant, from where she heard Coleman firing more shots and heard a machine gun being fired outside the restaurant. Sallustio was shot three times, but still managed to run from Armstrong and radio for assistance. When other officers arrived, they found Greeney dead at the scene. Greeney had died instantly. Allen was found inside the restaurant; Coleman and Armstrong had fled.

That same day, Armstrong told one friend that he got shot and that he returned a shot; he told his girlfriend that a police officer had asked him to step out of his car and that, when he did so, the officer pulled a gun on him and tried to shoot him; and he told another friend that someone shot him while trying to rob him. Thereafter, Armstrong and Coleman fled the state but were apprehended the next day in Maryland. Before being apprehended,

Armstrong had two bullets removed from his arm by a Maryland doctor.

A number of shell casings were recovered from the scene. All of the bullets removed from Sallustio and Greeney were fired from a nine-millimeter, semi-automatic weapon; Greeney had been shot from close range. Evidence reflected that Armstrong had purchased a nine-millimeter, semi-automatic weapon the month before the crime. Armstrong's prints were found in the blue Toyota as well as on firearm forms found in the car. Additional ballistics evidence reflected that the shots fired from the restaurant did not come from a nine-millimeter, semi-automatic weapon. This indicated that only someone near the car could have fired the shots that wounded Sallustio and killed Greeney. Additionally, testimony was introduced to show that Armstrong was seen with a nine-millimeter, semi-automatic gun right after the incident. Armstrong was convicted as charged.

At the penalty phase, the State presented evidence showing Armstrong's prior conviction of indecent assault and battery on a fourteen-year-old child. Armstrong presented evidence from a number of witnesses in support of the following nonstatutory mitigating circumstances: (1) he had significant physical problems during childhood (he was dyslexic but a good student and had a brain hemorrhage when he was a baby); (2) helped others and had a positive impact on others (routinely assisted his grandmother, brothers and sisters, both financially and emotionally; was a good father and provider to his son; trained others to do carpentry work and was a positive influence on those he assisted); (3) was present as a child when his mother was abused and would come to her aid; (4) could be productive in prison (was an excellent carpenter and plumber); (5) is a good prospect for rehabilitation; (6) codefendant received a life sentence; (7) the alternative sentence is life imprisonment without the possibility of parole; (8) Armstrong is religious (attends church); and (9) Armstrong failed to receive adequate medical care and treatment as a child (had a brain

hemorrhage when he was a baby but, due to finances, did not receive the medical attention he needed).

The jury recommended death by a nine-to-three vote. The trial judge found no statutory mitigating circumstances and four aggravating circumstances: (1) prior conviction of a violent felony; (2) committed while engaged in the commission of a robbery or flight therefrom; (3) committed for the purpose of avoiding arrest or effecting an escape from custody; and (4) murder of a law enforcement officer engaged in the performance of official duties. The trial judge sentenced Armstrong to death for the murder of Officer Greeney, to life imprisonment for the attempted murder of Officer Sallustio, and to life imprisonment for the armed robbery. Armstrong v. State, 642 So. 2d 730, 733-734 (Fla. 1994).

On appeal the Florida Supreme Court found that the trial court had improperly doubled two aggravating factors. The court affirmed the sentence finding the error to be harmless. Id.

Armstrong filed his initial motion for postconviction relief on March 18, 1997. One of the issues for which Armstrong was granted a hearing was a claim under Johnson v. Mississippi 486 U.S. 578 (1988).[2] In 1998 Armstrong's plea to the indecent assault was vacated. Consequently Armstrong amended his motion for postconviction relief raising a claim pursuant to Johnson. Armstrong asked the trial court to reverse his sentence of death based on the state's use of that now vacated guilty plea. Armstrong

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[2] Armstrong had three prior felonies which supported the aggravating factor of "Prior violent felony." Two of those felonies involved the contemporaneous convictions for crimes against two additional victims. The first was for the attempted first degree murder of Officer Robert Sallustio. Sallustio was the partner of the slain officer John Greeney who along with Greeney responded to the robbery scene. The second felony was for the robbery of Kenegral Allen, an employee of the Church' Fried Chicken. (ROA 2430). The third prior violent felony offered was Armstrong's 1985 guilty plea to indecent assault of a fourteen year old, Rose Flynch. (ROA 2433). Ms. Flynch testified at the penalty phase. (ROA 1838-1856). The Florida Supreme Court upheld the validity of the aggravator. Armstrong, 642 So. 2d at. 734

contended that the Johnson violation in the instant case amounted to a "structural defect", and therefore, the error could not be considered harmless.

In response the state argued that this issue was procedurally barred as a challenge to the now thirteen year old guilty plea could have and should have been made at the time of Armstrong's capital trial. Irrespective of the procedural bar, the state also argued that any error in relying on the indecent assault conviction was harmless as (1) there was no undue emphasis placed on the indecent assault conviction; (2) there were still two much more serious violent felony convictions to establish the aggravator; [3](3), the jury was correctly instructed that any one of the three standing alone would satisfy the aggravator; and (4) the trial court could now consider as an additional prior violent felony, Armstrong's conviction for an armed robbery that occurred thirteen days before the instant robbery/murder. Armstrong was convicted of the additional robbery six days after he was sentenced in the instant case.

After reviewing all the relevant information, the trial court denied relief finding that Armstrong's subsequent conviction for armed robbery that was not in existence at the time of the first trial would also now be used to satisfy the aggravator. The court concluded that this additional conviction would show Armstrong to be a recidivist robber and would result in a subsequent sentence of death.

On appeal the Florida Supreme Court reversed the trial court's finding, holding that the Johnson error was not harmless and Armstrong was entitled to a new sentencing hearing. Armstrong v. State, 862 So. 2d 705, (Fla. 2003) (Fla. 2003)(A-13-A-44). Petitioner sought rehearing, which was denied on December 19, 2003)(A-1).

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[3] Both victims of the two other violent felonies testified in detail during the guilt phase of the trial. (ROA 705-746, 803-831).

REASONS FOR GRANTING THE WRIT

THE FLORIDA SUPREME COURT'S PERFUNCTORY ANALYSIS OF THE JOHNSON V. MISSISSIPPI ERROR COMPLETELY IGNORED RELEVANT FACTORS ANNOUNCED BY THIS COURT IN NUMEROUS DECISIONS AND AMOUNTED TO A PER SE RULE OF REVERSAL

This case presents an opportunity for the Court to clarify the holding of Johnson v. Mississippi, 486 U.S. 578 (1988) regarding the issue of a "materiality" required for meaningful state appellate harmless error review where a Johnson violation has been identified. This Court was not afforded the opportunity to do that in Johnson, Id. at 590 (noting that the Mississippi Supreme Court did not conduct a harmless error analysis prior to affirming the sentence); Note: Hernandez v. Johnson, 213 F.3d 243, 253 (5th Cir. 2000)(recognizing that the United States Supreme Court has not defined "materiality" in the context of a Johnson error). Furthermore, as will be demonstrated below, the Florida Supreme Court's analysis is in direct conflict with other appellate courts as the opinion completely ignores all the relevant factors identified in Johnson and applied in numerous jurisdictions that are cited below. For those reasons certiorari review is necessary.

Although the Florida Supreme Court's decision purportedly applied Johnson, in fact, the Court applied a per se rule of reversal.[4] This Court clearly stated in Johnson, and subsequent decisions, that the invalidation of an aggravating factor is subject to harmless error review. See e.g. Romano v. Oklahoma, 512 U.S. 1 (1994)(explicitly rejecting the claim that a Johnson error requires automatic reversal of a death sentence based simply on the admission of prejudicial or

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[4] As Justice Wells observed in his concurring opinion, "...However, I expressly state my view that not every post-trial reversal of a conviction which is part of an aggravating circumstance is prejudicial. Prejudice in this type of situation requires a case-by-case analysis, as recognized by this Court in the cases which have found the postconviction vacation of a conviction to be harmless error." (A-37)

irrelevant evidence); California v. Roy, 519 U.S. 2 (1996)(granting relief to state as lower court improperly applied harmless error standard that was too limited and contrary to standards enunciated in Brecht). The Florida Supreme Court's decision is in complete contradiction to these holdings and should not stand. Cf. Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989)(explaining that it is only the prerogative of this Court to overrule its own decision). The Florida Supreme Court's analysis was perfunctory. The Court ignored crucial information which supported a finding of reliability of the evidence irrespective of the vacation of the conviction.

As noted above, Lancelot Armstrong was convicted of first degree murder and sentenced to death for the murder of Broward Sheriff Deputy Officer John Greeney III. One of the aggravating factors found in support of the death sentence was that Armstrong had committed three prior violent felonies.[5] However, when Armstrong, filed his initial motion for postconviction relief on March 18, 1997, one of the issues for which Armstrong was granted a hearing was a claim under Johnson v. Mississippi 486 U.S. 578 (1988). In 1998 Armstrong's plea to the indecent assault was vacated in Massachsetts. Armstrong then amended his motion for postconviction relief raising an actual Johnson claim and sought reversal of his sentence of death based on the state's use of the newly vacated guilty plea. Armstrong contended that the Johnson violation amounted to a "structural defect", and therefore, the error could not be considered harmless.

Although the state asserted that the issue was procedurally barred,[6] the state further argued that any error in relying on the indecent assault conviction was harmless as (1) there was no undue emphasis placed on the indecent assault conviction; (2) there remained two more serious, unchallenged, violent felony

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[5] Fla. Stat. 921.141 (5)(b).

[6] The State argued that the now thirteen year old guilty plea could have and should have been made at the time of Armstrong's capital trial.

convictions to establish the aggravator; (3), the jury was correctly instructed that any one of the three standing alone would satisfy the aggravator; and (4) the trial court could further consider as an additional prior violent felony, Armstrong's conviction for an armed robbery that occurred thirteen days before the instant robbery/murder.[7] After reviewing all the relevant information, the trial court denied relief.[8]

On appeal the Florida Supreme Court reversed the trial court's finding, holding that the Johnson error could not be harmless and Armstrong was entitled to a new sentencing hearing. Armstrong v. State, 862 So.2d 705 (Fla. 2003).

The Florida Supreme Court focused on the following. First, the State "urged" the jury to find the aggravating factor of "prior violent felony" based on two contemporaneous violent convictions as well as the prior guilty plea from Massachusetts. (A-29). Second, the trial court found the "prior violent aggravating factor" based **in part** on Armstrong's prior guilty plea. Id. Third, when applying the rationale of Johnson the Court held "...In Armstrong's case, the jury considered, in support of an aggravating factor, evidence of a conviction that has since been revealed to been materially inaccurate as that conviction has been vacated." (A-31)(emphasis added). And fourth, given that the nature of the crime involved "a sexual offense upon a child", the error was harmful. Id,

Interestingly, the first two considerations are circumstances that are inherent in every single jury trial. Obviously, the state introduces evidence at a trial that it believes is relevant and

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[7] Armstrong was convicted of the additional robbery six days after he was sentenced in the instant case. (PCR 715-728, SR-PCR 398-400).

[8] The trial court found that Armstrong's subsequent conviction for armed robbery, not in existence at the time of the first trial, would also now be used to satisfy the aggravator. The court concluded that this additional conviction would show Armstrong to be a recidivist robber and would result in a subsequent sentence of death. (PCR 784, 788-790).

probative of a factual issue. See generally Williams v. State, 681 So. 2d 688, 696 (Fla. 1996)(noting that almost all evidence introduced by the state that a criminal trial is prejudicial to the defendant). Consequently, it is appropriate for a prosecutor to rely on that evidence when addressing the jury. Notably, the Court did not and could not characterize the state's argument as being excessive or unduly focused on the Massachusetts guilty plea. The indecent assault was mentioned only one time in closing argument. The main thrust of the state's argument was that the killing of the officer was senseless. The entire closing argument totaled nine pages of transcript. Reference to the indecent assault comprises only twelve lines of the entire argument. (ROA 1931-1939). Absent any evidence or analysis that the guilty plea was the "sole" basis for the aggravator or became a "feature" of this aggravator, the Florida Supreme Court's analysis was devoid of any meaningful review. See Moon v. Head, 285 F.3d 1301, 1317 (11th Cir. 2002)(distinguishing Johnson v. Mississippi, in part due to fact that prosecutor's closing argument placed greatest emphasis for death sentence on facts of case and reference to vacated prior convictions amounted to five pages out of a forty-six page argument).

The second factor relied upon by the Florida Supreme Court was the trial court's sentencing order which noted the prior Massachusetts guilty plea as a conviction which in part satisfied the prior violent felony aggravator. (A-29). The trial judge's reference herein, to admissible, accurate evidence was appropriate, fair and an inherent component of all trials. Indeed, when discussing the effect of the admissibility of the conviction, Justice Wells stated, "The trial judge did not err in that admission." (A-37) (Wells, J., *concurring*).[9]

Consequently, the Court's focus on these two factors as part of its harmless error analysis amounts to no meaningful or fair analysis. Reliance on factors that are inherent in any jury trial

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[9] Indeed Johnson itself recognizes that evidence may be introduced regarding the nature of the underlying conviction to explain the facts of the case and the disposition of the charges, above and beyond the mere introduction of a judgement and sentence.

"would result" in an automatic finding of reversible error without any genuine consideration of the unique facts of the case. The Court's analysis was neither complete nor in depth. See Stringer v. Black, 503 U.S. 222, 230 (1992)(explaining that a state appellate court must engage in "a thorough analysis of the role an invalid aggravating factor played in the sentencing process"); Clemons v. Mississippi, 494 U.S. 738, 753 (1990)(finding harmless error analysis of state appellate court inadequate and refused to accept that court's "cryptic holding"); Sochor v. Florida, 504 U.S. 527, 540 (1992)(refusing to accept Florida Supreme Court's harmless error analysis describing the holding as stopping "far short of clarity"); Romano(explaining that Johnson error was not intended to amount to a per se rule of reversal).

Thirdly, the Florida Supreme Court concluded: "In Armstrong's case, the jury considered, in support of an aggravating factor, evidence of a conviction that has since been revealed to be materially inaccurate as that conviction has been vacated " (A-31). (emphasis added). By finding the Massachusetts guilty plea to be materially inaccurate simply by virtue of the fact that it had been vacated, the Florida Supreme Court imposed an automatic finding of harmful error.

Obviously, the threshold component of all Johnson claims include the fact that a prior conviction used at a subsequent trial is subsequently vacated. To rely solely on the fact of reversal as grounds for a finding of "material inaccuracy" without reviewing the evidence; without reviewing whether the evidence was presented to the jury and subject to cross-examination; or without reviewing the reasons for the reversal, is specious. See Dowling v. United States, 493 U.S. 342 (1990)(rejecting argument that acquittal of charges presumes that underlying conduct is unreliable); Cf. Custis v. United State, 511 U.S. 485 (1994)(recognizing that the vacation of prior felony based on the failure to appoint counsel is the only circumstance under which it is permissible to find a presumption of prejudicial error); Daniels, (same); Cf. Spivey v. Head, 207 F.3d 1263 (11th Cir. 2000)(finding that because jury heard evidence of underlying conduct, the fact that the conviction was subsequently

overturned was of little impact and did not warrant reversal). The continued focus on this point underscores the inadequacy of its holding.

Lastly, the Florida Supreme Court concluded that the nature of the prior conviction herein, that Armstrong admitted to an indecent assault of a child, was too prejudicial for considered under a harmless error Johnson analysis. (A-31). That analysis completely misconstrue the value of the victim's testimony. Rather than assessing the testimony for reliability as required in Johnson, the Court instead misapplied that rationale and concluded that the victim's testimony exacerbated the error. See Johnson, 486 U.S. at 586(finding that the fact of conviction without any evidence describing the underlying conduct offers little insight into reliability of defendant's guilt); See also Gardner v. State, 764 S.W.2d 416 (Ark. 1989)(finding no error in light of Johnson as victims described the nature of defendant's conduct); Gibbs v. Johnson, 154 F.3d 253 (5th Cir 1998)(same).

In fact, the Florida Supreme Court's erroneous attention to the nature of the prior conviction resulted in the complete failure to credit the weighty remaining two other very violent felonies, including attempted first degree murder of a police officer which more that satisfied the aggravating factor.[10] The Court's decision to only emphasis the nature of the "suspect" prior felony, completely distorted the record and the unchallenged significance of the remaining evidence in support of that multi-prior violent felony aggravator.

The Florida Supreme Court has completely misconstrued "what the main focus of the analysis" should include: is the

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[10] The State would also note that, Armstrong committed an additional armed robbery two weeks before this crime. That conviction was obtained a week after the capital case concluded. In assessing the harmless nature of the indecent assault, the postconviction trial judge noted that Armstrong again had three prior violent felonies, noting that the additional robbery conviction would portray him as a recidivist robber.

underlying evidence reliable, absent the fact of conviction. In other words, did the defendant commit the offense regardless of whether he was convicted. The opinion does not offer any proof that the Court even considered this crucial point.

In Johnson, this Court referenced three separate factors in discussing the reliability or material inaccuracy of the prior conviction. Johnson had filed an affidavit recalling his version of what happened regarding his earlier conviction.[11] He maintained his innocence claiming that the sexual encounter was consensual. Id, 486 U.S. at 582 n.2. Johnson also, on several occasions affirmatively and diligently attempted to obtain review via direct appeal of that conviction but was thwarted. Id at n. 3. And finally, the capital jury in Mississippi was never given the opportunity to assess the facts regarding the prior conviction because the prosecution **only** presented a certified judgement of the conviction.[12] Without anything more that the judgement, there was noting left for the jury to consider. This Court concluded that the prior assault conviction was materially inaccurate and therefore warranted relief. Id.

Presumably, there is a quantitative difference between a technical finding of an aggravator or a portion thereof and whether

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[11] Johnson had been convicted of sexual battery in New York.

[12] This Court noted:

> The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with evidence describing that conduct-the document submitted to the jury proved only the facts of the conviction and confinement and nothing more. That petitioner was imprisoned is not proof that he was guilty of the offense...

Id, 468 U.S. at 586

suspect facts proving the violation are materially inaccurate as proclaimed in Johnson. The instant case equally conflicts with Zant, because an Eighth Amendment transgression can be reviewed for harmlessness if it can be demonstrated that any impact is de minimus and that the violation was never a feature but rather, only an additional component in the proof of an aggravator. In this instance the fact that there were two rather than three prior violent felonies to prove the aggravator was clearly subject to a harmless error analysis and was not per se harmful.

The Florida Supreme Court completely ignored the facts of this case that overwhelmingly supported a finding of reliability of the evidence. First, Armstrong has never said he is innocent of the crime of indecent assault. To the contrary, Armstrong with the advice of counsel, John Miller, pled guilty to the crime. Not only had Armstrong admitted guilt, he unlike the defendant Johnson, never sought to challenge the 1984 plea until 1998. Unlike Johnson, Armstrong had every opportunity to do so. For instance, trial counsel John Miller participated in the preparation for this penalty phase with the full knowledge that the plea was to be used by the state. (SR-ROA 521-523). In fact, Miller's recitation of the facts was used in part to cross-examine the victim during her penalty phase testimony. (ROA 1849-1856). Yet at no time during the trial did Armstrong claim that the indecent assault was materially inaccurate. Cf. Wainwright v. Witt, 469 U.S. 412, 431 (1985)(finding it appropriate to consider the silence of counsel in a circumstance later claimed to be filled with egregious injustice when assessing the claims of a defendant).

Moreover the plea was not vacated because Armstrong alleged that he was innocent. Rather, in 1998, fourteen years after the fact, a Massachusetts attorney filed a motion to set aside the prior plea. (PCR 582-587). The factual basis for the motion was the statement by former counsel, John Miller. (Id.). Miller testified at the 1998 hearing in a Massachusetts trial court that according to his memory, the trial court offered to reduce the charge of rape to indecent assault during the probable cause hearing. Miller claims that his client never formally accepted the plea nor was he ever

informed of his rights.[13] (PCR 599, 608). Based on Miller's testimony and the Commonwealth of Massachusetts' inability to rebut the testimony because no transcripts existed, the trial court vacated Armstrong's plea in March of 1999.

The final distinguishing factor from Johnson is that the facts of the assault in the instant case were presented to the jury through the testimony of the victim Rose Flynn. Therefore the evidence presented to corroborate the fact of the conviction was something more than a mere document. Rather, the credibility of the witness was something the jury could assess and did. The victim was subject to cross-examination, which included general questions testing her memory of what happened and an emphasis on the fact that Armstrong did not use any physical force against her. (ROA 1851, 1853, 1856). This Court's concerns regarding the complete lack of any evidence in support of the prior conviction in Johnson is not present in this case. Consequently, there has been no evidence that showed the prior guilty plea conviction was materially inaccurate.[14]

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[13] On cross-examination, the Commonwealth of Massachusetts pointed out that Miller was an experienced attorney who represented well over a couple thousand criminal defendants. He is also knowledgeable regarding the charges of rape and indecent assault, yet inexplicably he waited until 1998 to bring this claim.(PCR 600). Miller acknowledged that he was aware of Armstrong's capital conviction and sentence. (PCR 607).

[14] The facts of this case are strikingly similar to Daniels v.United States, 149 L. Ed. 2d 590, 600 (2201)(finding presumptively valid prior state convictions which are now being used as enhancement where defendants failed to pursue those remedies when available). Therein, petitioner attempted to attack two prior guilty pleas almost sixteen years after they were entered. Because, Daniels had waited so long, the transcripts from his plea colloquies had been destroyed. Consequently, the government had no way of rebutting Daniel's claim. This Court noted that the facts of Daniels reinforced its concern that delay in seeking available remedies greatly interferes with the orderly administration of justice and the finality of judgments. Id at 598.

The Florida Supreme Court's refusal to closely scrutinize the circumstance surrounding Armstrong's complete lack of any diligence in

CONCLUSION

As noted by Justice O'Connor's concurring opinion in Sochor, "[A]n appellate court's bald assertion that an error of constitutional dimensions was "harmless' cannot substitute for a principled explanation of how the court reached that conclusion. Id. 504 U.S. at 541 (O'Connor, J. *concurring*). The analysis set forth in Armstrong does not contain a principled explanation. The Florida Supreme Court's analysis is not only inadequate for its failure to consider the relevant inquiries identified in Johnson, the opinion is in conflict with the several cases cited above which all require appellate courts to throughly and thoughtfully, detail the unique facts of the particular case which justify the result reached by the reviewing court. Because that constitutionally mandated review was never completed in the state appellate court, certiorari review is warranted.

Respectfully submitted,

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bringing this claim in a timely fashion will exacerbate those concerns. This is especially so given the importance of the prior violent felony aggravator in light of this Court's opinion in Ring v. Arizona, 536 U.S. 583 (2002). See, Lackawanna County District Attorney v. Coss, 149 L. Ed 2d 608, 617 (2001)(precluding state prisoner in federal habeas proceedings from mounting long overdue challenges to state prior convictions used as enhancements finding that such a practice interferes with finality and administration of justice and is not permissible) See also; Ryan v. United States, 214 F.3d 877, 881-882 (7th Cir.2000)(explaining that honoring judgements after the opportunity for direct review has past encourages the timely filing of claims; fosters respect for judgements and preserves the orderly process of justice).

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Motion for Rehearing
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IN THE SUPREME COURT OF FLORIDA

FRIDAY, DECEMBER 19, 2003

CASE NOS.: SC01-1874 & SC02-1122
Lower Tribunal No.: 90-5417CF-B

LANCELOT URILEY ARMSTRONG	vs.	STATE OF FLORIDA
LANCELOT URILEY ARMSTRONG	vs.	JAMES V. CROSBY, JR, ETC.
Appellant/Petitioner		Appellee/Respondent

The Motion for Rehearing filed by Lancelot Uriley Armstrong in Case Nos. SC01-1874 and SC02-1122, and the Motion for Rehearing filed by the State of Florida in Case No. SC01-1874 are hereby denied.

ANSTEAD, C.J., and WELLS, PARIENTE, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy
Test:

Thomas D. Hall [seal]
Clerk, Supreme Court

tc
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SUSAN BAILEY
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RACHEL DAY
CELIA A TERENZIO
HON. JAMES I. COHN, JUDGE
HON. HOWARD FORMAN, CLERK

IN THE SUPREME COURT OF FLORIDA

LANCELOT URILEY ARMSTRONG,

Appellant,

vs. Case No. SC01-1874

STATE OF FLORIDA,

Appellee.
_____/

STATE'S MOTION FOR REHEARING

COMES NOW Appellee, State of Florida, by and through undersigned counsel and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, and moves this Honorable Court to grant rehearing in this matter, on the good faith basis that this Court has overlooked or misapprehended specific points of law and fact, and as grounds therefor states:

1. Lancelot Armstrong was convicted of first degree murder and sentenced to death for the murder of Broward Sheriff Deputy Officer John Greeney III. The conviction and sentence were upheld on appeal. Armstrong v. State, 642 So.2d 730, 733-734 (Fla. 1994). One of the aggravating factors found in support of the death sentence was that Armstrong had committed three prior violent felonies.[1] Two of those felonies involved the contemporaneous convictions for crimes against two additional victims. The first was for the attempted first degree murder of Officer Robert Sallustio. Sallustio was the partner of the slain

[1] Fla. Stat. 921.141 (5)(b).

officer John Greeney who along with Greeney responded to the robbery scene at Church's Fried Chicken. The second felony was for the robbery of Kenegral Allen, an employee of the Church' Fried Chicken. (ROA 2430). The third prior violent felony offered was Armstrong's 1985 guilty plea to indecent assault of a fourteen year old, Rose Flynch. (ROA 2433). Ms. Flynch testified at the penalty phase. (ROA 1838-1856). The trial court relied upon all three prior convictions in support of the aggravator. (ROA 2430).

2. Armstrong filed his initial motion for postconviction relief on March 18, 1997. Following multiple amendments, and subsequent evidentiary hearing, all relief was denied in September of 2002.

3. One of the issues for which Armstrong was granted a hearing was a claim under Johnson v. Mississippi 486 U.S. 578 (1988). In 1998 Armstrong's plea to the indecent assault was vacated. Consequently Armstrong amended his motion for postconviction relief raising a claim pursuant to Johnson. Armstrong asked the trial court to reverse his sentence of death based on the state's use of that now vacated guilty plea. Armstrong contended that the Johnson v. Mississippi violation in the instant case amounted to a "structural defect", and therefore, the error could not be considered harmless. In response the state argued that this issue was procedurally barred as a challenge to the now thirteen year old guilty plea could have and should have been made at the time of Armstrong's capital trial. Irrespective of the procedural bar, the state also argued that any error in relying on the indecent assault conviction was harmless as (1) there was no undue emphasis placed on the indecent assault conviction; (2) there were still two much more serious violent felony convictions to establish the aggravator; (3), the jury was correctly instructed that any one of the three standing alone would satisfy the aggravator; and (4) the trial court could now consider as an additional prior violent felony, Armstrong's conviction for an armed robbery that occurred thirteen days before the instant robbery/murder. Armstrong was convicted of the additional robbery six days after he was sentenced in the

instant case. (PCR 715-728, SR-PCR 398-400). After reviewing all the relevant information, the trial court denied relief finding that Armstrong's yet additional prior violent for armed robbery that was not in existence at the time of the first trial would also now be used to satisfy the aggravator. He concluded that this additional conviction would show Armstrong to be a recidivist robber and would result in a subsequent sentence of death. (PCR 784, 788-790).

4. On appeal this Court reversed the trial court's finding, holding that the Johnson error was not harmless and Armstrong was entitled to a new sentencing hearing. Armstrong v. State, Case No. 01-1874 (Fla. October 30, 2003). This Court's decision was premised on four factors without any discussion regarding the trial court's reasoning for denying relief. As will be discussed below, the reasoning employed by this Court misapprehends the harmless error analysis envisioned in Johnson and amounts to a per se rule of reversal which is in direct conflict with Johnson and other precedent from this Court.

5. The second reason for granting rehearing is, that the only case cited by this Court in support of its conclusion that the Johnson claim was reversible error was Rivera v. Dugger, 629 So. 2d 105, 108 (Fla 1993). Armstrong, slip op. at 20. However, the facts of that case were clearly distinguishable and do not warrant a reversal in this case. Rehearing is warranted as the opinion either ignores or overlooks the legal shortcomings of its reliance on Rivera.

6. In applying a harmless error analysis, this Court focused on the following. First, the State "urged" the jury to find the aggravating factor of "prior violent felony" based on two contemporaneous violent convictions as well as the prior guilty plea from Massachusetts. Slip opinion at 19. Second, the trial court found the "prior violent aggravating factor" based **in part** on Armstrong's prior guilty plea. Id. Third, when applying the rationale of Johnson this Court held "In Armstrong's case, the jury

considered, in support of an aggravating factor, evidence of a conviction that has since been revealed to been materially inaccurate as that conviction has been vacated." Slip op. at 20 (emphasis added). And fourth, given that the nature of the crime involved "a sexual offense upon a child", the error was harmful. Id, at 20-21.

7. This analysis is completely flawed as it amounts to per se reversible error without any true analysis of the pertinent facts specific to this case. For instance, the first two factors noted by this Court are circumstances that are inherent in every single jury trial. Obviously, the state introduces evidence at a trial it hopes is relevant and probative of a factual issue. See generally Williams v. State, 681 So. 2d 688, 696 (Fla. 1996)(noting that almost evidence introduced by the state that a criminal trial is prejudicial to the defendant). Consequently, it is appropriate for a prosecutor to rely on that evidence when addressing the jury.[2] To then turn around thirteen years later and punish the state for simply fulfilling its duty is illogical, and interferes with the orderly process of justice.

8. The second factor considered in the harmless error analysis was the trial judge's reference in its order that the prior guilty plea as a conviction which in part satisfied the prior violent felony aggravator. Slip opinion at 20. Again, the judge's reference to admissible, accurate evidence was appropriate, fair and an inherent component of every trial. Indeed, when discussing the effect of the judge's error, Justice Wells stated, "The trial judge did

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[2] Notably, this Court did not and could not characterize the state's argument as being excessive or unduly focused on the Massachusetts guilty plea. Excessive reference to evidence later found to be inaccurate is a factor that is not necessarily present in every case and is therefore truly a relevant consideration in any case by case analysis. See Moon v. Head, 285 F.3d 1301, 1317 (11th Cir. 2002)(distinguishing Johnson v. Mississippi, in part due to fact that prosecutor's closing argument placed greatest emphasis for death sentence on facts of case and reference to vacated prior convictions amounted to five pages out of a forty-six page argument).

not err in that admission." Slip at 29-30 (Wells,J., *concurring*). In other words the trial judge did what all judges do in all trials, i.e., consider valid relevant testimony presented by one side or the other. Consequently, the Court's focus on the two factors discussed above as part of a harmless error analysis amounts to no meaningful or fair analysis at all. Reliance on factors that are inherent in any jury trial results in an automatic finding of reversible error without any genuine consideration of the unique facts of the case.

9. The third factor weighed by this Court was the determination the guilty plea was "materially inaccurate." This Court found as follows,

> "In Armstrong's case, the jury considered, in support of an aggravating factor, evidence of a conviction that has since been revealed to be materially inaccurate as that conviction has been vacated "

Slip op. at 20. By finding this guilty plea to be materially inaccurate simply be virtue of the fact that it had been vacated amounts to an automatic finding of harmful error. This analysis is simplistic, grossly incomplete and circular. Obviously, the threshold component of all Johnson claims involve the fact that a prior conviction used at a subsequent trial is then vacated. To rely solely on that fact as grounds for a finding of "material inaccuracy" is specious and a complete misapplication of Johnson.

10. Johnson makes clear that the analysis involves much more than the perfunctory treatment employed here. Therein, the Court referenced three separate factors when discussing the material inaccuracy of the prior conviction. The Court noted that petitioner Johnson had filed an affidavit recalling his version of what happened regarding his earlier conviction.[3] Johnson maintained his innocence claiming that the sexual encounter was

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[3] Johnson had been convicted of sexual battery in New York.

consensual. Id, 486 U.S. at 582 n.2. Second, Johnson on several occasions affirmatively and diligently attempted to obtain review via direct appeal of that conviction but was completely thwarted by the state. Id at n. 3. And third, the capital jury in Mississippi was never given the opportunity to assess the facts regarding the prior conviction because the prosecution only presented a certified judgement of the conviction. On this point the Court noted:

> The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with evidence describing that conduct-the document submitted to the jury proved only the facts of the conviction and confinement and nothing more. That petitioner was imprisoned is not proof that he was guilty of the offense...

Id, 468 U.S. at 586. Without anything more that the judgement, there was noting left for the jury to consider. It was these three factors the Court noted that led to the conclusion that the prior assault conviction was materially inaccurate and therefore warranted relief. Id.

11. The facts of ths case are completely distinguishable and warrant a different finding. First, Armstrong has never said he is innocent of the crime of indecent assault. To the contrary, Armstrong with the advice of counsel, John Miller, pled guilty to the crime. Not only had Armstrong admitted guilt, he unlike the defendant Johnson, never sought to challenge the 1984 plea until 1998. And also unlike Johnson, Armstrong had every opportunity to do so. For instance, trial counsel John Miller participated in the preparation for this penalty phase with the full knowledge that the plea was to be used by the state. (SR-ROA 521-523). In fact, Miller's recitation of the facts was used in part to cross-examine the victim during her penalty phase testimony. (ROA 1849-1856). Yet at no time during the trial did Armstrong claim that the indecent

assault was material inaccurate.[4]

12. Moreover the plea was not vacated because Armstrong alleged that he was innocent. Rather, in 1998, fourteen years after the fact, a Massachusetts attorney filed a motion to set aside the prior plea. (PCR 582-587). The factual basis for the motion was the statement by former counsel, John Miller. (Id.). Miller testified at the 1998 hearing in a Massachusetts trial court that according to his memory, the trial court offered to reduce the charge of rape to indecent assault during the probable cause hearing. Miller claims that his client never formally accepted the plea nor was he ever informed of his rights.[5] (PCR 599, 608). Based on Miller's testimony and the Commonwealth of Massachusetts' inability to rebut the testimony because no transcripts existed, the trial court vacated Armstrong's plea in March of 1999. Consequently, there has bene no evidence presented to concluded that the prior guilty plea conviction was materially inaccurate.

13. The final distinguishing factor from Johnson is that the facts of the assault in the instant case were presented to the jury through the testimony of the victim Rose Flynn. Therefore the evidence presented to corroborate the fact of the conviction was something more than merely a document. Rather, the credibility of the witness was something the jury could assess and did. The victim was subject to cross-examination, which included general questions testing her memory of what happened and an emphasis on the fact that Armstrong did not use any physical force against

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[4] Armstrong's only attack against the admissibility of the prior conviction at trial was a claim that it was not considered a felony. (ROA 1813-1815).

[5] On cross-examination, the Commonwealth of Massachusetts pointed out that Miller was an experienced attorney who represented well over a couple thousand criminal defendants. He is also knowledgeable regarding the charges of rape and indecent assault, yet inexplicably he waited until 1998 to bring this claim.(PCR 600). Miller acknowledged that he was aware of Armstrong's capital conviction and sentence. (PCR 607).

her. (ROA 1851, 1853, 1856). The concerns of the United State Supreme Court in Johnson regarding the complete lack of any evidence in support of the prior conviction is not a legitimate concern in this case. This Court's truncated analysis regarding whether the evidence was materially accurate was improper

14. The fourth factor relied upon by this Court was the nature of the prior conviction. Herein, Armstrong admitted to an indecent assault of a child. This Court summarily concluded that such a crime was too prejudicial to be considered harmless in a Johnson analysis. Slip opinion at 20. However, that limited view of the evidence fails to take into account the fact that there remained two other very violent felonies, including attempted first degree murder of a police officer which more that satisfied the aggravating factor. This Court's failure to consider that compelling evidence in its analysis is flawed. For instance in Owen v. State, 596 So. 2d 985, 990 (Fla. 1992) this Court rejected a Johnson claim finding no difficulty with the fact that the jury heard evidence regarding Owen's three separate convictions for murder, sexual battery and armed burglary of a fourteen year old girl. Those crimes were very similar in nature to the crimes for which he was on trial. A review of the direct appeal opinion regarding the suspect convictions, clearly depicts the horrific nature of the prior violent felonies. Owen v. State, 560 So. 2d 207 (Fla. 1987). Although all three of those convictions were latter vacated, this Court found the error to be harmless given that there still remained one prior violent felony for attempted first degree murder. Owen, 596 So. 2d at 989-990. The state asserts that given the harmlessness attached to the jury's impermissible reliance on three horrific convictions including one for murder, there can be no doubt that reliance on an indecent assault charge in the instant case must also be considered harmless error. See also Occichone v. State, 768 So. 2d 1037, 1040 n. 3 (Fla. 2000)(finding no merit to claim that death sentence is unconstitutional in light of fact that a prior conviction was impermissible as there was a contemporaneous murder conviction which would support the "prior violent felony" aggravator).

15. Although sexual assault on a child is a repulsive crime, it cannot be considered more prejudicial than the crimes of attempted murder or first degree murder. This Court's decision to place all its emphasis on the nature of the "suspect" prior felony, completely ignores and distorts the significance of the remaining evidence in support of the aggravator and is in contradiction of prior cases from this Court.

16. In summary, the fact that Armstrong pled guilty to indecent assault, he has never exercised diligence in getting the conviction overturned,[6] and that the jury was given the opportunity to assess the accuracy of the information, this Court erred in finding that under Johnson, Armstrong's jury was subjected to materially inaccurate information requiring reversal.

17. And finally this Court's reliance on Rivera is misplaced. In granting postconviction relief on a Johnson claim in Rivera, this Court relied on the following: the vacated conviction was an assault on a police officer, which would be considered more prejudicial given the fact that Rivera's potential sentence of death was for the murder of a police officer; the prosecutor emphasized

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[6] The state would also reiterate that the facts of this case overwhelming warrant imposition of a procedural bar. Otherwise, prosecutors across the state will be extremely reluctant to present to a jury valid relevant evidence in support of a death sentence for fear that someday it will result in a reversal based on technical violations. Punishing the state for exercising its right to give full faith and credit to criminal judgments from other states should not be countenanced. Failure to apply a procedural bar in the instant case will do just that. Eutzy v. State, 541 So. 2d 1143, 1146 (Fla. 1989). See also, Henderson, 617 So. 2d at, 316 (Fla. 1993)(finding Johnson claim to be procedurally barred since facts underlying challenge to prior violent felony were not raised within two years of when they were ascertained); Adams v. State, 543 So. 2d 1244, 1246-1247 (Fla. 1989)(same). Appellant's failure to meet his burden and demonstrate why this claim should not have been considered barred warrants imposition of that bar on appeal. Cf. Daniels v. United States, 532 U.S. __, 149 L. Ed. 2Ed 590 (2001)(upholding federal procedural bar on challenge to sixteen year-old state guilty plea in federal habeas proceedings were prior guilty plea is used as enhancement in federal trial).

the similarities of the two crimes; the prior conviction became a feature of the case; three of six aggravating factors were vacated; and the jury had only recommended death by a margin of one vote. Rivera 629 So. 2d at 109.

18. None of those factors are present in this case. Also unlike the present case the vote for death in Rivera was 7 to 5 and absent the vacated conviction the entire aggravator was stricken. The vote for death was 9 to 3 there remained two separate prior violent felonies against two additional victims, one a police officer, that more than satisfy the aggravating factor of prior violent felony.[7] This Court's reliance on Rivera is misplaced.

19. In conclusion, this Court's harmless error analysis is incomplete, and a complete misapplication of Johnson; Owen and Occhicone. Rehearing is warranted.

WHEREFORE, the State respectfully requests that this Honorable Court GRANT the state's Motion for Rehearing.

Respectfully submitted,

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[7] The sentencing court noted that the jury deliberated for a total of thirty minutes before recommending a sentence of death. (ROA 2434). Consequently, the factors in support of the capital sentence were overwhelming. In other words this is not a case were the sentence hinged on the one prior conviction of indecent assault.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that the foregoing document was sent by United States mail, postage prepaid, to Rachel Day, Esq., Office of Capital Collateral Regional Counsel, 101 N.E. 3rd Ave. #400, Fort Lauderdale, Florida 33301, this ____ day of November, 2003.

_____

Celia A. Terenzio
Assistant Attorney General

Supreme Court of Florida

Nos. SC01-1874 & SC02-1122

LANCELOT URILEY ARMSTRONG,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

LANCELOT URILEY ARMSTRONG,
Petitioner,

vs.

JAMES V. CROSBY, JR., etc.,
Respondent.

[October 30, 2003]

PER CURIAM.

Lancelot Uriley Armstrong appeals an order of the circuit court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Armstrong also files a petition for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const. For the reasons that follow, we affirm in part and reverse in part the circuit court's denial of postconviction relief, vacate the death sentence, and remand for resentencing

before a new jury. We also deny the petition for writ of habeas corpus.

BACKGROUND

Armstrong was convicted of first-degree murder, attempted murder of a law enforcement officer, and armed robbery. The facts of Armstrong's crimes are more fully discussed in this Court's opinion in Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied, 514 U.S. 1085 (1995). Briefly, they are as follows. Around two o'clock in the morning of February 17, 1990, Armstrong and another man, Michael Coleman, arrived at a Church's Fried Chicken restaurant of which Armstrong's former girlfriend, Kay Allen, was the assistant manager. Coleman and Armstrong ordered Allen to get the restaurant's money from the safe. Before doing so, she managed to activate the silent alarm. Shortly thereafter, Armstrong returned to his car while Coleman remained inside with Allen to collect the money. Due to the alarm, Deputy Sheriffs Robert Sallustio and John Greeney were dispatched to the restaurant, where they found Armstrong sitting in his vehicle. While Greeney was performing a "pat down" of Armstrong, shots were fired from the restaurant. Armstrong then retrieved his gun from the vehicle and fired at the officers. Deputy Sallustio was shot three times but survived. Deputy Greeney died instantly from close-range gunshot wounds.

The jury convicted Armstrong of the first-degree murder of Deputy Greeney, attempted murder of Deputy Sallustio, and robbery. The jury also recommended death by a nine-to-three vote. The trial court found no statutory mitigating circumstances and four aggravating circumstances: (1) Armstrong had a prior conviction for a violent felony; (2) the murder was committed while Armstrong was engaged in the commission of a robbery or flight therefrom; (3) the murder was committed for the purpose of avoiding arrest or effecting an escape from custody; and (4) Armstrong murdered a law enforcement officer engaged in the performance of his official duties. The trial court sentenced Armstrong to death for the murder conviction and to life

imprisonment for the attempted murder of a law enforcement officer and armed robbery convictions.

On direct appeal, Armstrong raised twenty-four issues.[1] This Court affirmed the convictions and sentences, finding error in the improper doubling of two aggravating circumstances—committed for the purpose of avoiding arrest and murder of a law enforcement officer—but concluded that the improper doubling was harmless error beyond a reasonable doubt. Id. at 738-40.

On April 24, 2000, Armstrong filed an amended motion for postconviction relief, raising thirty-four claims.[2] The circuit court

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[1] See Armstrong, 642 So. 2d at 734 n.2 (listing direct appeal claims).

[2] Armstrong's claims in that motion were as follows: (1) he lacked funding for effective representation; (2) he was denied access to public records; (3) there was a lack of adversarial testing due to ineffective assistance of trial counsel, withholding of exculpatory or impeachment material, newly discovered evidence, and improper trial court rulings; (4) newly discovered evidence existed; (5) his trial counsel was ineffective during voir dire; (6) he had an Ake claim regarding mental health; (7) there was cumulative error; (8) he had ineffective assistance of trial counsel regarding mitigation; (9) he was innocent of first-degree murder; (10) he was innocent of the death penalty; (11) he was absent from a critical stage of the trial; (12) there was improper burden-shifting in the penalty-phase jury instructions; (13) an unconstitutionally vague aggravating factor of avoiding or preventing lawful arrest was considered; (14) an inaccurate, vague, and overly broad instruction was given on the aggravating factor of murder during the commission of a felony; (15) nonstatutory aggravating factors were introduced; (16) the jury was misled regarding a sense of sentencing responsibility; (17) his rights were denied by the rule prohibiting lawyers from interviewing jurors; (18) Florida's death penalty constitutes cruel and unusual punishment; (19) Florida's capital sentencing scheme is arbitrary and capricious; (20) there was prejudicial pretrial publicity and a failure to change venue; (21) inadmissible victim impact evidence was considered; (22) the trial court refused to find or consider mitigating circumstances; (23) there were record omissions that denied him a proper direct appeal; (24) inadequate harmless error analysis was utilized on direct appeal; (25) an invalid prior conviction was used; (26) there was a lack of testing of scientific evidence under Frye v. United States, 293 F. 1013 (DC. Cir. 1923); (27) the jury was misled regarding the instruction that a majority vote was required to recommend life or death; (28) his sentence was

below (postconviction court) held a Huff[3] hearing, thereafter summarily denied most of Armstrong's claims, and scheduled a limited evidentiary hearing on two claims: (1) his death sentence was predicated upon a since-vacated prior felony conviction; and (2) ineffective assistance of trial counsel was rendered with regard to the investigation and presentation of mitigating evidence for the penalty phase. See State v. Armstrong, No. 90-5417CF10B (Fla. 17th Cir. Ct. order filed Jan. 2, 2001) (prehearing order). Following the evidentiary hearing, the postconviction court entered a final order denying all relief. See State v. Armstrong, No. 90-5417CF10B (Fla. 17th Cir. Ct. order filed May 25, 2001) (posthearing order). Armstrong now appeals the postconviction court's denial of his rule 3.850 motion. He also petitions this Court for a writ of habeas corpus.

RULE 3.850 APPEAL

In this appeal, Armstrong asserts the postconviction court erred in denying postconviction relief on the basis of numerous claims.[4] We will first address those issues relating solely to the

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predicated upon an automatic aggravating circumstance; (29) jurors were stricken on an impermissible basis; (30) there was a systematic exclusion of eligible prospective jurors by the use of peremptory challenges in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968); (31) a sufficient level of intent and participation to warrant imposition of the death penalty did not exist; (32) he is incompetent to be executed; (33) the conviction and sentence were illegally imposed in violation of international law; and (34) he received inadequate notice of a crime due to charges of both premeditated and felony murder.

[3] Huff v. State, 622 So. 2d 982, 983 (Fla. 1993).

[4] Those claims are: (1) Armstrong's sentence was based on a since-vacated prior felony conviction; (2) trial counsel was ineffective in investigating and presenting mitigation; (3) trial counsel rendered ineffective assistance regarding (a) the failure to challenge in-court identification, (b) the failure to invoke the rule of sequestration, (c) the failure to request a Frye hearing, (d) the failure to adequately challenge the qualifications of State witnesses, (e) the failure to object to improper bolstering of State witnesses, (f) the failure to object to opinion testimony from unqualified witnesses, and (g) jury selection; (4) there

guilt phase of Armstrong's trial[5] and then turn to Armstrong's first issue, alleging entitlement to postconviction relief on the basis of the invalidation of a prior felony conviction that was introduced at his penalty-phase hearing, which we find dispositive of all remaining penalty-phase issues.

Guilt Phase

Armstrong raises three claims relating solely to the guilt phase of his trial, the first of which involves seven subclaims.

In his first guilt-phase claim, Armstrong asserts that the postconviction court erred in summarily denying his claims of ineffective assistance of trial counsel regarding seven aspects of his trial. Under the standard announced in Strickland v. Washington, 466 U.S. 668, 687 (1984), to prevail on a claim that counsel provided constitutionally ineffective assistance, a defendant must demonstrate specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Second, the defendant must demonstrate prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. This Court's standard of

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was a lack of specific intent to kill, thus rendering the death penalty inappropriate; (5) exculpatory or impeachment material was withheld; (6) there was newly discovered evidence relevant to both guilt and penalty phases; (7) his public records requests were denied; (8) he was innocent of first-degree murder and the death penalty; (9) unconstitutional jury instructions were used in the penalty phase; (10) nonstatutory aggravating circumstances were improperly introduced; (11) he was absent from critical stages of the trial; (12) his conviction and sentence were illegally imposed in violation of international law; (13) Florida's death penalty constitutes cruel and unusual punishment; (14) his rights were denied by the rule prohibiting lawyers from interviewing jurors; (15) he is incompetent to be executed; and (16) cumulative error exists.

[5] Those issues are claims (3)(a)-(g), (5), and (11).

review of a trial court's ruling on an ineffective assistance claim also is two-pronged: (1) appellate courts must defer to trial courts' findings on factual issues but (2) must review de novo ultimate conclusions on the performance and prejudice prongs. Bruno v. State, 807 So. 2d 55, 61-62 (Fla. 2001).

In his first ineffective assistance subclaim, Armstrong asserts his trial counsel provided ineffective assistance by failing to object to unreliable identification testimony by witness Bobby Norton. The postconviction court summarily denied this claim on the following basis:

> The defense developed a consistent theme that witness identification may have been influenced by photographs of Defendant displayed on television and in the newspapers. This theme was also brought out on cross examination of Bobby Norton. However, this Court finds the record reflects that there is no reasonable probability that Norton's identification of the Defendant would have been suppressed had a motion been filed.
>
> Norton was one of five eyewitnesses identifying the Defendant as having been present at Church's Fried Chicken. Norton witnessed the Defendant talking with the night manager . . . Kay Allen. Although Norton was initially unsure whether he could identify the Defendant, Norton was able to pick the Defendant out of a photo lineup shortly after the murder. Norton subsequently made an in-court identification of the Defendant. The jury was well aware of Norton's initial uncertainty. All relevant facts necessary to assess the credibility of Norton were presented. Using the [Strickland] standard . . . this Court finds that the outcome of the case would not have been different had [Armstrong's counsel] objected to the

identification made of the Defendant by Norton. This claim is without merit.

Prehearing order at 4-5. We find no error in this conclusion. Given that Norton's identification was tested on cross-examination, four other eyewitnesses placed Armstrong at the scene, and Armstrong conceded in closing argument that he was present, Armstrong failed to sufficiently allege prejudice under Strickland.

In his second subclaim, Armstrong asserts that his trial counsel provided ineffective assistance by failing to invoke the Rule of Sequestration until after some State witnesses had already testified. The postconviction court summarily denied this claim, concluding that it was legally insufficient as pled. We find no error in this conclusion, as Armstrong made the mere conclusory allegation that prejudice resulted from the witnesses' opportunity to listen to each other's testimony without any degree of specificity as to what facts were testified to prior to invocation of the rule and without any allegation that certain witnesses' testimonies differed, after hearing other witnesses testify, from their prior statements or depositions. See Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000) ("The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden.").

In his third and fourth subclaims, Armstrong asserts that his trial counsel provided ineffective assistance by failing to request a Frye[6] hearing regarding DNA evidence presented through the testimony of George Duncan, a DNA serologist with the Broward Sheriff's Office, and Dr. Martin Tracey, a forensic expert court-appointed to Armstrong's case, and by failing to adequately challenge those witnesses' qualifications as DNA experts. At

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[6] Frye v. United States, 293 F. 1013 (D.C. Cir.1923). Under Florida law, a Frye hearing is utilized in order to determine if expert scientific opinion is admissible. See Flanagan v. State, 625 So. 2d 827, 829 (Fla. 1993). Such opinion must be based on techniques that have been "general[ly] accept[ed]" by the relevant community and found to be reliable. Frye, 293 F. at 1014.

Armstrong's trial, Duncan and Tracey's consistent findings were that blood taken from the front seat of Armstrong's car matched the murder victim's blood. In summarily denying Armstrong's claims of ineffective assistance regarding DNA testimony, the postconviction court stated:

> This claim is conclusively rebutted by the record. A forensic expert was authorized by the court. [Armstrong's counsel] asked for a proffer of the State's DNA evidence and an objection was renewed prior to Dr. Tracey's testimony. Dr. Tracey satisfied the Frye test. He testified that DNA testing has been accepted in the scientific community since the mid-seventies.
>
> George Duncan, the DNA serologist with the Broward Sheriff's Office, testified that he had previously testified as an expert in DNA extraction, but never in DNA profiling. Over [Armstrong's counsel's] objection, the Court qualified Duncan as an expert in DNA profiling. The only blood sample of value was removed from the front seat of the Defendant's car. Duncan found that the sample matched the blood of the deceased victim, Deputy Greeney. This Court finds that the requirements of Frye were met. This Court further agrees with the State that "any refinements or additions to the Frye analysis" which have evolved since the trial, sub judice, cannot be applied in evaluating the effectiveness of trial counsel's performance. [Armstrong's counsel] handled those issues concerning scientific evidence with "such skill and knowledge as will render the trial a reliable adversarial testing process."

Prehearing order at 5-6 (citations omitted). Noting that the DNA evidence was offered solely to show that Greeney's blood was

found in Armstrong's vehicle, the postconviction court further concluded that there was no reasonable probability that the outcome of the trial would have been different had the DNA evidence been excluded, because the DNA evidence was cumulative.

We agree with the postconviction court that Armstrong failed to sufficiently allege prejudice. The only relevancy of the DNA evidence was the proximity of Greeney to Armstrong and Armstrong's vehicle when Greeney was shot. The record supports the court's conclusion that, absent Duncan and Tracey's DNA testimony, ample other evidence established that Greeney was standing next to Armstrong when he was fatally shot: testimony indicated that Greeney was conducting a "pat down" on Armstrong when the first shots were fired; and ballistics evidence indicated Greeney was shot from close range. See Armstrong, 642 So. 2d at 733. We therefore find no error in the summary denial of these claims.[7]

In his fifth and sixth subclaims, Armstrong asserts that his trial counsel provided ineffective assistance by failing to object to improper bolstering of the State witnesses' credibility and by failing to object to the opinion testimony of State witness Detective Kammerer regarding the "Coomassie blue" method of detecting latent fingerprints. The State, however, correctly notes that these issues were presented and argued in Armstrong's postconviction motion as "judicial error" rather than ineffective assistance of trial

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[7] We further note the error in Armstrong's assertion that his trial counsel provided ineffective assistance by failing to challenge more specific elements of DNA testing, such as autoradiograms and population substructuring, through a Frye hearing. This trial occurred in 1991, six years prior to this Court's clarification of the Frye test in Brim v. State, 695 So. 2d 268 (Fla. 1997), that each stage of the DNA process, i.e., the methodology for determining DNA profiles, as well as the statistical calculations used to report the test results, are subject to the Frye test. Armstrong's trial counsel cannot be found ineffective for not demanding the satisfaction of a more complex test than was required by the law at the time of trial.

counsel. For that reason, we agree with the postconviction court that these claims were procedurally barred as they could have been raised on direct appeal as trial error. This Court will only review those claims actually presented to the court below and thus will not consider the modified versions of these claims under ineffective assistance analysis.

In his final subclaim, Armstrong asserts his trial counsel provided ineffective assistance during jury selection by failing to ensure that a reader was present to assist Armstrong, who has dyslexia, and by failing to adequately question or strike juror Deborah Baker. We agree with the postconviction court that Armstrong's claim regarding a reader at voir dire was legally insufficient as pled and factually rebutted by the record. Armstrong failed to explain how a reader would have aided in his ability to consult with his attorney during voir dire. The record also indicates that Armstrong conferred with his counsel on several occasions during voir dire. We also find that Armstrong's claim regarding juror Baker is clearly refuted by the record. Armstrong alleged that the prosecutor's questioning of juror Baker indicated an apparent familiarity with her. However, the voir dire record reveals that the prosecutor did not indicate he knew juror Baker but, rather, that he presupposed what her answers to certain questions would be since he was employing a questioning method designed to condition the jury to follow the requirements of the law rather than to reveal facts of the jurors's lives. The prosecutor engaged in similar questioning of other jurors. Armstrong's contention that additional questioning of Baker "likely" would have revealed a bias is merely a conclusory allegation that is refuted by the record, which indicates Baker, together with the majority of the panel, answered "no" when asked whether anyone knew the prosecutor.

We therefore find no merit to Armstrong's first guilt-phase claims of ineffective assistance of trial counsel.

In his second guilt-phase claim, Armstrong asserts that the postconviction court erred in summarily denying his claim of a

Brady[8] violation, in which he asserted that the State had or knew of material exculpatory evidence, in the form of two statements by Officer Ronnie Noriega taken as part of an internal affairs investigation, and failed to provide that evidence to Armstrong. The postconviction court held as follows with regard to this Brady issue:

> The alleged exculpatory evidence in this case are statements of Officer Ronnie Noriega, an alleged eyewitness to the crime. As a result of the public records productions, the Defendant received internal affairs records from the Plantation Police Department, Noriega's employer at the time of the crime in issue. These records contained statements by Noriega as to where he was at the time of the shooting at Church's Fried Chicken.
>
> The Defendant contends that Noriega's statements which were given to internal affairs are substantially different from those Noriega gave at trial. The Defendant asserts that the statements given to internal affairs support and corroborate co-defendant Coleman's alleged confession that he (Coleman) shot Deputy Greeney from the restaurant door.
>
> This Court finds that there was no Brady violation. The State did not withhold information regarding Noriega who was listed by the state as a witness and who was deposed by defense counsel. As with the State, the Defendant had equal access to Noreiga. Further, this Court finds that Noriega's statements given to internal affairs do not inculpate Coleman nor do the statements contradict the State's theory.

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[8] Brady v. Maryland, 373 U.S. 83 (1963).

Prehearing order at 7-8.

We find Armstrong's Brady claim conclusively refuted by the record. Armstrong asserts that he was prejudiced by the fact that he did not receive copies of Noriega's two investigation statements. Importantly, Armstrong bases his prejudice argument on the differences between Noriega's version of events, as told in his investigation statements, and the State's trial theory, rather than any alleged materiality of the fact that an internal affairs investigation was conducted. However, the content of those statements does not materially differ from Noriega's deposition testimony, which was given in the presence of Armstrong's counsel. In both his investigation statements and his deposition, Noriega gave the following statement of events: he was driving near the Church's Fried Chicken restaurant when he heard shots; he then noticed two black men standing next to a car in front of Church's; he looked in another direction and then heard additional shots, which caused him to duck and put on his brakes quickly to prevent an accident; and after his car came to a stop, he again looked toward Church's and no longer saw the two men or their car but did see officers arrive on the scene and run to and then kneel at a place where he assumed a man was down. Because Armstrong's counsel was present at Noriega's deposition, Armstrong was in fact in possession of the same information he would have had if he had received the actual transcripts of Noreiga's investigation statements. Therefore, Armstrong has failed to satisfy the Brady test as he has not shown a reasonable probability[9] that the outcome of the proceedings would have been different had he been in possession of the internal affairs investigation statements by Noriega.

In his third and final guilt-phase claim, Armstrong asserts that the postconviction court erred in summarily denying his claim that because a reader did not assist him during voir dire, Armstrong

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[9] A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 694 (1984).

was rendered effectively absent during a critical stage of the proceedings. As we have already discussed, Armstrong's claim of ineffective assistance of counsel on this point was correctly denied. However, Armstrong also asserts that fundamental error resulted. We conclude that the postconviction court correctly found this claim procedurally barred. This claim could have been raised on direct appeal.

Finding no error in the postconviction court's summary denial of Armstrong's claims relating solely to the guilt phase, we affirm the denial of his motion for postconviction relief as that denial relates to all guilt-phase issues.

Penalty Phase

Regarding the penalty phase of Armstrong's trial, we find that his first issue, alleging entitlement to postconviction relief on the basis of the invalidation of a prior felony conviction that was introduced at his penalty phase, necessitates resentencing before a new jury and thus renders moot all remaining penalty-phase issues.

At Armstrong's penalty phase, the State presented two witnesses to testify regarding Armstrong's 1985 Massachusetts conviction of indecent assault and battery on a child of the age of fourteen. A records custodian for the Massachusetts district court in which the conviction was obtained testified that the offense was a felony and provided a certified copy of the conviction and sentence. The State then called the victim of that crime, who was fourteen at the time of the crime and twenty at the time of Armstrong's trial. She testified that she met Armstrong in Massachusetts, where they both lived at the time, through a close family friend, Angela, to whom Armstrong was married. Regarding the events of the crime, she gave the following testimony:

Q. What happened on January 12th, do you remember what—'85—do you remember what day of the week that was?

A. It was a Saturday.

Q. Okay. What happened? Tell us what happened.

A. Angela had asked us to come over to her house . . . .

. . . .

A. And we went over to her house Saturday night and I had to go to church for A.J.S., church program and Angela and Lance was to take us, but he didn't want her to go because she was sick because she was pregnant. So he said he will take me.

. . . .

A. He said he would take me. So as we was driving to the church, he asked if I minded if he stopped somewhere so we could talk. So I told him fine. You know, I figured he'd pull off the side of the road or something. But he drove to some park. A park I have never seen before.

. . . .

A. We went to the park. He pulled up in the parking space and we were sitting there and he was talking. I don't know what—it was so long. I don't know what we were talking about. He asked me to get over into the driver's seat. So I got over

into the driver's seat and was playing with the wheel like I was driving.

Q. Had you ever driven a car before?

A. No. I was just playing around with the wheel and he just took me by my shoulder and laid me down on the seat and got on top of me and he started moving up and down on me. I was just lying there. I was telling him to stop.

. . . .

A. . . . And a car came and pulled up beside us and parked like a couple of parking spaces beside us and he kept his head low and I told him to get off me. He told me not to make any noises because he didn't want them to know we were there. And they left after a couple of minutes and then he just got up off of me and reached into the glove compartment and took out some tissue and started wiping himself. I saw this white stuff all over his hand.

Q. Did you ever see anything like that, that white stuff before?

A. No.

Q. Okay.

A. And then he started, tried to lift up my dress. I said what you doing. He said I want to make sure you are okay. I just told him leave me alone and I wanted to go home.

Q. Okay.

A. And then we drove. He drove back to his apartment.

. . . .

Q. Okay. What happened when you got back in the apartment?

A. . . . So I went and sat on the couch and turned on the TV and started to study my homework.

. . . .

Q. So what happens? You're sitting in the living room. What happens?

A. Then Lance comes in and he sits on the couch across from where I was sitting and he just was asking me about what I was studying, what I was doing. And then he came over to where I was sitting on the couch and I just sat there looking at the TV and then he just grabbed me by my shoulders and pushed me down on the couch and got on top of me and I was about to scream and he told me not to scream. He said you better not scream because Angela's in the other room and you don't want to wake her up because you know she's sick. And I just stayed there not knowing what to do because I was scared because I figured she probably would be upset and if I made any noises—

Q. What were you doing while he was on top of you?

A. I was trying to push him off of me and, you know, trying to make some kind of noise but he just kept telling me stop. Don't make any noises. Don't make any noises because she would get upset. Then he just lifted up my night gown and he put his penis in my vagina.

He pushed my panties over the side and put his penis in my vagina and I wanted to—started to scream a little and he just stopped and he just laid on top of me and I was—what is he doing and he got up and went over to her room and I ran into the bathroom and locked the door and then he came knocking on the door and I wouldn't leave and then after a while when I thought he was gone, I went into her, Angela's, room and I just went to sleep on the floor.

The victim's testimony then continued regarding how she was upset by these events and eventually told her grandmother what had happened.

In closing penalty-phase arguments, the State urged the jury to find the aggravating circumstance that Armstrong had "previously been convicted of a violent felony" on the basis of Armstrong's two contemporaneous convictions of attempted murder and robbery and this prior Massachusetts conviction. The jury recommended a death sentence, and the trial court based its finding of that aggravating circumstance, in part, on the Massachusetts conviction.

After Armstrong's direct appeal to this Court, he filed a motion for new trial with the Massachusetts court regarding his 1985 conviction. In 1999, that court vacated Armstrong's conviction of indecent assault and battery on a child of the age of fourteen, finding it constitutionally invalid. Therefore, Armstrong asserted in his subsequent 3.850 motion for postconviction relief

that he was entitled to a new penalty-phase proceeding. The postconviction court granted an evidentiary hearing on the issue but denied relief, concluding that error under Johnson v. Mississippi, 486 U.S. 578 (1988), had been shown but was harmless beyond a reasonable doubt in light of an armed robbery conviction obtained against Armstrong after his penalty phase that would be admissible upon resentencing as evidence of another valid, prior violent felony conviction to be considered in lieu of the vacated conviction.

In this appeal, Armstrong asserts, on the basis of Johnson, that the postconviction court erred in denying relief as to this issue. We agree. This Court has previously discussed the Johnson decision:

> In Johnson, the petitioner's death sentence was predicated, in part, on a previous conviction which was vacated after the trial and direct appeal. 486 U.S. at 580. During the sentencing phase of the petitioner's trial, the previous conviction was argued to the jury and used to support Mississippi's prior violent felony aggravating factor. Id. at 581. The Supreme Court reversed the death sentence, holding that the consideration of a subsequently vacated conviction to support an aggravating factor violates the Eighth Amendment. Id. at 590.
>
> In reaching this conclusion, the Court reiterated its previous holding that capital sentencing decisions cannot be based on "mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" Id. at 585 (quoting Zant v. Stephens, 462 U.S. 862, 885 (1983)). The Court stated, "the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has

been revealed to be materially inaccurate." Id. 486 U.S. at 590.

Rivera v. Dugger, 629 So. 2d 105, 108 (Fla. 1993). In Armstrong's case, the jury considered, in support of an aggravating factor, evidence of a conviction that has since been revealed to be materially inaccurate as that conviction has been vacated. It is now clear that reliance upon that conviction to support Armstrong's sentence was erroneous under Johnson. Given the nature of the crime underlying the vacated conviction—a sexual offense upon a child—and the detailed testimony given by the young victim of that crime at Armstrong's penalty phase, we cannot say that the consideration of Armstrong's prior felony conviction of indecent assault and battery on a child of the age of fourteen constituted harmless error beyond a reasonable doubt.

PETITION FOR WRIT OF HABEAS CORPUS

In his petition for a writ of habeas corpus, Armstrong raises four claims.[10] We will address in turn each issue relating solely to the guilt phase of Armstrong's trial.[11] All remaining claims are now moot as we have ordered resentencing before a new jury.

In his first claim, Armstrong alleges ineffective assistance of appellate counsel regarding four aspects of the guilt phase of his trial. We initially note that habeas relief on the basis of appellate

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[10] Armstrong alleges the following: (1) his appellate counsel provided ineffective assistance regarding (a) the failure to appeal the denial of Armstrong's motion for change of venue, (b) the failure to appeal the improper qualification of the State's witnesses as experts, (c) the failure to appeal the admission of certain photographs, (d) the failure to ensure a complete record, and (e) the failure to raise a cumulative-error argument; (2) there was an incorrect harmless error analysis on direct appeal regarding the improper doubling of aggravating circumstances in light of Armstrong's vacated prior felony conviction; (3) he was denied a proper direct appeal due to omissions in the record; and (4) Florida's death penalty scheme is unconstitutional.

[11] Those issues are claims (1)(a)-(d) and (3).

counsel's ineffectiveness is limited to those situations where the petitioner establishes, first, that appellate counsel's performance was deficient because the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance; and second, that the petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). If a legal issue would in all probability have been found to be without merit had counsel raised it on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective. Id.

In his first subclaim, Armstrong asserts that his appellate counsel rendered ineffective assistance by failing to raise on direct appeal the trial court's denial of a motion for change of venue. We find no merit to this argument. First, we note that Armstrong's motion for change of venue was prematurely filed before an attempt to select an impartial jury. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds in order to try the case solely on the evidence presented in the courtroom. McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977). Thus, trial courts are encouraged to attempt to impanel a jury before ruling on a motion for change of venue because this provides an opportunity to determine through voir dire whether individuals who have not been seriously infected by the publicity can be found. See Davis v. State, 461 So. 2d 67, 69 n.1 (Fla. 1984) (stating motion for change of venue should not be ruled upon prior to jury selection because an impartial jury may be seated if court finds credible the assurances of prospective jurors that they can set aside extrinsic knowledge and decide the case on the evidence); Manning v. State, 378 So. 2d 274, 276 (Fla. 1979) (approving procedure where ruling on defendant's motion for change of venue

is delayed until attempt has been made to select jury). For that same reason, a motion for change of venue should be renewed at the conclusion of jury selection or be considered waived. See Martin v. State, 816 So. 2d 187, 188 (Fla. 2d DCA) ("Jury selection issues are deemed waived after acceptance of the jury, unless the objection is renewed, or the jury is accepted subject to an earlier objection."), review dismissed, 835 So. 2d 267 (Fla. 2002). A review of the record in this case indicates Armstrong did not renew his motion for change of venue upon the selection of the jury and thus did not preserve this issue for appellate review.

Furthermore, the mere fact that jurors were exposed to pretrial publicity is not enough to raise the presumption of unfairness. See Castro v. State, 644 So. 2d 987, 990 (Fla. 1994). It is sufficient if the juror can lay aside his or her opinion or impression and render a verdict based on the evidence presented in court. See id.; Bundy v. State, 471 So. 2d 9, 19 (Fla. 1985). Armstrong acknowledged in his brief to this Court that those jurors who were exposed to pretrial publicity and selected for the jury also stated that they could set aside their pretrial knowledge and feelings about the victims. Therefore, we conclude that there existed insufficient grounds for appellate counsel to successfully argue fundamental error regarding this issue. In the absence of preservation or fundamental error, this issue would have been nonmeritorious on direct appeal.

In his second subclaim, Armstrong asserts that his appellate counsel rendered ineffective assistance by failing to raise on direct appeal the improper qualification of three State witnesses as experts. We find no merit to this claim with regard to two of those witnesses, George Duncan and Dr. Martin Tracey, for the same reasons we found no merit to Armstrong's 3.850 appeal claim that his trial counsel rendered ineffective assistance regarding these witnesses. As to the third witness, Armstrong alleges that Charles Edel was unqualified to testify about "searing" on Deputy Greeney's clothing and that appellate counsel should have appealed the trial court's denial of Armstrong's objection to the admission

of his testimony. We disagree. Edel was found to be a firearms operations expert after he testified that he had fired hundreds of different styles of weapons and had been a firearms instructor for approximately eight years, which included the testing of fire weapons "for court presentation to show operability." When asked about the mechanics of a "handgun flame," Edel testified that a flame results from the expulsion of the exploding gunpowder within the casing, that it can go up to twelve inches from a handgun, and that searing results from such flames. Although Edel admitted that he had not attended any school specifically regarding searing, he also testified that he did not believe there was a "searing school" or, as Armstrong's counsel had argued, a "field of searing" separate from the field of firearms operation. Given the entirety of this testimony, it appears clear that Edel was sufficiently qualified to testify in regard to the searing on Greeney's clothing, and appellate counsel was not ineffective for failing to raise this nonmeritorious claim.

In his third subclaim, Armstrong asserts that his appellate counsel rendered ineffective assistance by failing to raise on direct appeal the admission of three photographs of Officer Sallustio's uniform and wounds, specifically State's Exhibits T, Q, and S. However, the record reveals that, of those three exhibits, Armstrong's trial counsel objected only to Exhibit S, arguing that it was both cumulative of other photographs that would "better describe the wound" and inflammatory. We find no merit to Armstrong's claim of ineffective assistance of appellate counsel. If this issue had been raised on direct appeal, appellate counsel would have faced two very high standards of review: (1) fundamental error regarding Exhibits T and Q; and (2) abuse of discretion regarding Exhibit S. On the basis of this record, we do not conclude that Armstrong has demonstrated a reasonable probability that this issue would have been found meritorious and resulted in a reversal of his conviction.

In his fourth and final subclaim, Armstrong asserts that his appellate counsel rendered ineffective assistance by failing to ensure that "critically material depositions and proceedings" were

included in the record on appeal. However, Armstrong only specifically cites to the absence of certain strike conferences from the record, stating that answers by some jurors to voir dire questions went unrecorded. The alleged error here is unclear. If the alleged error is the failure to ensure the recording of portions of voir dire strike conferences, then it would be trial counsel error rather than appellate counsel error and not properly raised in this petition. To the extent that Armstrong is alleging that his appellate counsel was ineffective, he would need to show not only that his appellate counsel failed to include available transcripts in the appellate record but also that those portions of the record that were missing were material to a potentially meritorious issue on direct appeal. Armstrong has not shown the former since he has stated that the missing portions went unrecorded, which indicates they were not available for appellate counsel to include in the appellate record. As for the latter, Armstrong alleges that the incomplete record deprived him of a potentially meritorious argument that prospective juror Coffie was struck for cause without proper justification and on the basis of race. Yet, the record indicates that there was a race-neutral reason for striking Coffie, who stated in voir dire that both his brother and his good friend had been arrested by the Broward Sheriff's Office and that he himself had been harassed in his neighborhood by Broward Sheriff's officers three or four times. The victims of Armstrong's crimes were Broward Sheriff's officers. Thus, the allegedly incomplete record did not deprive Armstrong of a potentially meritorious argument.

We therefore find no merit to Armstrong's first habeas claim of ineffective assistance of appellate counsel.

A second habeas claim that relates solely to the guilt phase of Armstrong's trial is closely related to his last ineffective assistance of appellate counsel subclaim. Citing Dobbs v. Zant, 506 U.S. 357 (1993), Armstrong asserts that full appellate review of capital cases must be done on the basis of a complete record. As well, citing section 921.141(4), Florida Statutes (1985), Armstrong notes that Florida law requires review of capital cases by this Court

"of the entire record." He therefore alleges that he was denied a proper direct appeal due to record omissions and, citing Delap v. State, 350 So. 2d 462 (Fla. 1977), claims entitlement to habeas relief. However, Armstrong does not allege that this or any other court refused, in violation of its duty, to examine any portion of the record. And, with the exception of voir dire strike conferences, he has failed to specifically allege what "critical depositions and proceedings" were absent from the record or, in the absence of knowing specifics about unrecorded events, how he is even aware that such events went unrecorded. Bare allegations of unrecorded depositions and proceedings are legally insufficient to entitle him to relief. As for the voir dire strike conferences, Armstrong has failed to link a meritorious appellate issue to the allegedly missing record and thus cannot establish that he was prejudiced by its absence. Furthermore, while this Court did require a new trial on the basis of missing record in Delap, the record that was missing in Delap was far more significant than that allegedly missing here. See id. at 463 (record missing transcript of the jury charge conferences, charge to the jury in both the trial and penalty phases, voir dire of the jury, and closing arguments of counsel in both the trial and penalty phases). Therefore, Delap is inapplicable to the present case.

Having found no merit to Armstrong's habeas claims that relate solely to the guilt phase of his trial and having ordered resentencing on the basis of a 3.850 appeal issue, thereby rendering penalty-phase issues moot, we deny the petition for a writ of habeas corpus.

CONCLUSION

We hold that Armstrong is entitled to postconviction relief on the basis of his first claim. Accordingly, we affirm as to all issues relating solely to the guilt phase of Armstrong's trial but vacate the death sentence and remand for resentencing before a new jury on the first-degree murder conviction.

It is so ordered.

WELLS, PARIENTE, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

WELLS, J., concurs with an opinion, in which CANTERO and BELL, JJ., concur.

ANSTEAD, C.J., concurs specially with an opinion, in which PARIENTE, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

WELLS, J., concurring.

I concur fully with the decision in this case. I write only to point out that I believe that the use of term "error" in the admission of the prior conviction is not accurate in the sense that it connotes error by the trial judge in admitting the prior conviction and testimony in respect to it at the time that it was admitted. The trial judge did not err in that admission. I believe a more accurate analysis is that the vacation of the prior conviction has now caused us to conclude that our confidence in the death sentence in this case has been sufficiently undermined that a new penalty phase is required as a matter of law. I join this conclusion because of the extensive testimony admitted during the penalty-phase trial concerning the facts underlying the vacated prior conviction. However, I expressly state my view that not every post-trial reversal of a conviction which is part of an aggravating circumstance is prejudicial. Prejudice in this type of situation requires a case-by-case analysis, as recognized by this Court in the cases which have found the postconviction vacation of a conviction to be harmless error.

CANTERO and BELL, JJ., concur.

ANSTEAD, C.J., specially concurring.

I concur in the majority decision. However, in light of the United States Supreme Court's recent decision in Wiggins v. Smith, 123 S. Ct. 2527 (2003), I feel compelled to write separately to note my concerns with Armstrong's separate claim of ineffective assistance of counsel for failure to adequately investigate mitigation to be presented in the penalty phase. The U.S. Supreme Court has repeatedly reaffirmed the importance of thorough investigation by defense counsel into mitigating factors to be presented in the penalty phase of capital cases. See, e.g., id. at 2537; Williams v. Taylor, 529 U.S. 362, 394-99 (2000); Strickland v. Washington, 466 U.S. 668, 690-91 (1984).[12] Wiggins contains a detailed explanation of how the standard established for evaluating the performance of counsel set out in the landmark decision in Strickland should be interpreted and applied.

In Wiggins, the Court stressed that defense counsel's investigations "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Id. at 2537 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93 (1989) (hereinafter 1989 ABA Guidelines)). Referring to ABA Guidelines, the Court noted that among those topics that should be considered for presentation are "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Id. (citing 1989 ABA Guidelines 11.8.6, at 133). In concluding that defense counsel's investigation was unreasonably deficient, the Court relied heavily on the ABA standards for capital defense, noting that such standards had long

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[12] Likewise, this Court has recognized the importance of trial counsel's investigation into mitigating factors and has not hesitated to reverse sentences where such investigations have been deemed deficient and prejudice has resulted. See, e.g., Ragsdale v. State, 798 So. 2d 713, 720 (Fla. 2001); Rose v. State, 675 So. 2d 567, 570-74 (Fla. 1996); Stevens v. State, 552 So. 2d 1082, 1085-87 (Fla. 1989).

been referred to as "guides to determining what is reasonable." Id. (quoting Strickland, 466 U.S. at 688).

In Wiggins, collateral counsel's investigation discovered a wealth of mitigation that trial counsel had not presented or investigated. Id. at 2533. The mitigation included in Wiggins' "bleak life history" indicated that he had suffered severe physical and sexual abuse from multiple individuals growing up. Id. Additionally, his mother was a chronic alcoholic who frequently left him and his siblings at home alone for days, forcing them to beg for food and to eat paint chips and garbage. Id. Further, despite the fact that funds were available for retaining a forensic social worker in order to prepare a detailed social history, Wiggins' trial attorneys had not done so. Id. In collateral proceedings, Wiggins' trial counsel defended the lack of investigation or presentation of mitigating evidence, in effect arguing that these decisions were a matter of strategy and that trial counsel "decided to focus their efforts on 'retry[ing] the factual case' and disputing Wiggins' direct responsibility for the murder." Id. However, after reflecting on the standards that should guide counsel's actions in investigating mitigation, the Supreme Court concluded that Wiggins' defense team, who had presented none of the extensive mitigation that existed in the case during the penalty phase of the trial, had not performed the level of investigation that would allow them to make a reasonably informed decision not to present such mitigation. Id.

Determining that the decision not to pursue mitigation was made based on a prematurely truncated investigation, the Court stated:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [Wiggins' trial counsel]

> limited the scope of their investigation for strategic reasons, Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Id. at 2538 (citing Strickland, 466 U.S. at 691). The Court rejected arguments that Wiggins' defense team made a strategic decision based on the limited investigation they had conducted not to introduce mitigation, commenting that "the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a post-hoc rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." Id. at 2538. Ultimately, the Supreme Court determined that trial counsel's investigation into Wiggins' background did not meet the professional norms that prevailed at the time of trial, noting that "[d]espite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." Id. at 2537. Hence, Wiggins' "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." Id. at 2538.

In the instant case, similar observations can be made. The 1989 ABA Guidelines that the Supreme Court concluded should have guided counsel's investigation in Wiggins should have provided similar guidance to Armstrong's counsel.[13] These standards underscore not only the importance of defense counsel's investigation into mitigating factors, but also the understanding that often strategy shifts between the penalty and guilt phases of a

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[13] The 1989 ABA Guidelines were recently superseded by a February 2003 revision. Nevertheless, the 1989 version of the guidelines provided the prevailing norms at the time of both Wiggins' and Armstrong's trial.

capital trial. In general, preparation for both the penalty and guilt phases is essential, and counsel should be aware that "the sentencing phase of a death penalty trial is constitutionally different from sentencing proceedings in other criminal cases." 1989 ABA Guidelines 11.8.1, at 123.[14] "If inconsistencies between the guilt/innocence and the penalty phase defenses arise, counsel should seek to minimize them by procedural or substantive tactics." 1989 ABA Guidelines 11.7.1(B), at 115. In conducting the investigation into those individuals who might present testimony at the penalty phase, counsel is required to seek out witnesses who are "familiar with aspects of the client's life history that might affect . . . possible mitigating reasons for the offense(s), and/or mitigating

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[14] In commentary to guideline 11.8.6, the authors explained that sentencing proceedings in capital cases are a unique area of criminal practice:

> Sentencing proceedings in a capital case resemble a separate trial more than they resemble non-capital sentencing proceedings. The Constitutional due process right to present evidence, as well as the right to counsel, to confront the witnesses against the defendant, and to not be placed twice in jeopardy, adhere to capital sentencing proceedings. Experienced criminal counsel familiar with sentencing practices in non-capital cases may not recognize the different form of advocacy required at a death penalty sentencing trial. The evidence to be presented by the defense -- indeed, the whole theory of proceeding -- at the sentencing phase stands outside normal criminal trial practice. Attorneys skilled in narrowing the focus of trial to exclude irrelevant references to the life and character of a client may find themselves unprepared for the sentencing phase of a capital case where the life and character of the client may have to be revealed in detail. The assistance of one or more experts (e.g. social worker, psychologist, psychiatrist, investigator, etc.) may be determinative as to outcome . . . .

(Footnotes omitted.)

evidence to show why the client should not be sentenced to death." Id. 11.4.1(D)(3)(B), at 95.[15]

In the instant case, although trial counsel, who had taken one other case to the penalty phase prior to Armstrong's trial, undoubtedly performed some investigation into Armstrong's past and presented some mitigation during the penalty phase, he conceded, and it was clear from the evidentiary hearing, that his investigation had failed to uncover substantial important mitigation regarding Armstrong's family and social history.[16] Nevertheless, trial counsel claimed and the trial court accepted that much of the negative information associated with Armstrong's formative years would have conflicted with trial counsel's strategy to "humanize"

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[15] In addition to investigating potential lay witnesses, in preparing for the penalty phase counsel should consider retaining "[e]xpert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor." Id. 11.8.3(F)(2), at 129.

[16] It is not necessary to repeat all of the mitigation presented at the evidentiary hearing here, or detail how it differed in quantity or quality from that which was introduced at the penalty phase. Nevertheless, while this case might be distinguished from Wiggins somewhat by the fact that limited mitigation was introduced during the penalty phase, it suffices to say that the evidentiary hearing demonstrated that there was a large amount of mitigation from family members and from expert witnesses that was never uncovered or presented at the penalty phase. The evidence introduced at the evidentiary hearing included but was not limited to the following: (1) that Armstrong suffered from a seizure disorder; (2) that he suffered from extreme poverty while growing up in Jamaica; (3) that he suffered from "pica," an eating disorder frequently seen in abused or neglected children, which caused him to eat lead paint, chicken excrement, and dirt; (4) that the accidental amputation of his fingers in a sugar cane accident led to Armstrong being hospitalized for five months and afterwards he kept his hand hidden to avoid being harassed by other children; (5) that Armstrong was routinely and severely physically abused by his binge-drinking stepfather; (6) that he suffered from a learning disability and was often beaten at school for failing to understand his schoolwork; (7) that Armstrong was living in Jamaica during a time when political and social conditions were marked by extreme violence, and Armstrong experienced these conditions first hand; and (8) that Armstrong was arrested by Jamaican police and was brutally tortured before he was released.

Armstrong. Moreover, relying on mental health evaluations done for competency before trial, trial counsel and the court below determined that trial counsel's failure to put on any expert testimony regarding Armstrong's mental health did not amount to a deficient performance.

However, here, as in Wiggins, and even presuming that the pretrial evaluations revealed some mitigation evidence, it is clear that during his investigation trial counsel did not discover mitigation of the same quantity or quality of that which actually existed and was later introduced at the postconviction evidentiary hearing. Hence, it would be difficult to conclude that counsel's knowledge of the available mitigation was sufficient to make an informed strategic choice on these matters. Without having uncovered the information regarding Armstrong's troubled background, any " 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' " Wiggins, 123 S. Ct. at 2541 (quoting Strickland, 466 U.S. at 690-91). In fact, any attempt to distinguish the difference between the limited mitigation presented at Armstrong's penalty phase and that presented at the evidentiary hearing is strikingly similar to the type of post-hoc rationalization that the Supreme Court rejected in Wiggins. Id. at 2538.

Because we are remanding on separate grounds, there is no need to reach the issue of trial counsel's investigation in this case under a Wiggins analysis. However, my hope is that judges and lawyers will heed the message of Wiggins. In order to avoid uneven dispensation of the death sentence, it is essential for counsel to fully investigate the available mitigation so that any decision on whether or not to present such information is made on a reasonable basis.

PARIENTE, J., concurs.

Two Cases:

An Appeal from the Circuit Court in and for Broward County,

James I. Cohn, Judge - Case No. 90-5417CF-B

and An Original Proceeding - Habeas Corpus

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ORIGINAL

Supreme Court, U.S.
FILED
MAR 23 2004
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DOCKET NO. 03-1198

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

JAMES CROSBY, Secretary,
Florida Department of Corrections
Petitioner,

vs.

LANCELOT URILEY ARMSTRONG,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Counsel for Respondent, Lancelot Uriley Armstrong, asks leave of this Court to proceed *in forma pauperis* in this proceeding. Petitioner has been found indigent by each state court in which he has challenged this conviction and sentence and has been permitted to proceed *in forma pauperis* before each of those courts: the Florida Supreme Court and the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida.

WHEREFORE, Petitioner requests permission to proceed in this action *in forma pauperis*.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Celia Terenzio, Assistant Attorney General, 1515 North Flagler Drive, Suite 9000, West Palm Beach, Florida, 33401, on this 23rd day of March, 2004..

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FILED
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DOCKET NO. 03-1198

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES CROSBY, Secretary,
Florida Department of Corrections,

Petitioner,

vs.

LANCELOT URILEY ARMSTRONG,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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OBJECTION TO CONSIDERATION OF PETITIONER'S QUESTION PRESENTED

1. Respondent objects to the Petitioner's question presented that the Florida Supreme Court's decision found any violation of *Johnson v. Mississippi* to be *"de facto per se* harmful error" when it specifically did not create such a rule, nor did the court misapply the principles of *Sochor v. Florida*; *Clemons v. Mississippi*; *Stringer v. Black*; *Romano v. Oklahoma*; *Zant v. Stephens*; *Dowling v. United States*. Thus, this Court should not consider Petitioner's question presented.

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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES CROSBY, Secretary,
Florida Department of Corrections,

Petitioner,

vs.

LANCELOT URILEY ARMSTRONG,

Respondent.

Lancelot Uriley Armstrong respectfully submits this brief in opposition to the Petitioner's writ of certiorari to review the decision of the Florida Supreme Court.

CITATION TO OPINION BELOW

The decision of the Florida Supreme Court in this cause appears as *Armstrong v. State, 862 So. 2d 705 (Fla. 2003)*.

REASONS FOR DENYING THE WRIT

I.

THE COURT SHOULD DENY CERTIORARI REVIEW BECAUSE THE FLORIDA SUPREME COURT FOLLOWED THE MANDATE OF JOHNSON V. MISSISSIPPI AND CONDUCTED A PROPER HARMLESS ERROR ANALYSIS IN REACHING ITS CONCLUSION.

> I join this conclusion because of the extensive testimony admitted during the penalty- phase trial concerning the facts underlying the vacated prior conviction. However, I expressly state my view that not every post-trial reversal of a conviction which is part of an aggravating circumstance is prejudicial. Prejudice in this type of situation requires a case by case analysis, as recognized by this Court in the cases which have found the postconviction vacation of a conviction to be harmless error.

Armstrong v. State, 862 So. 2d 705 (Fla. 2003)(Justice Wells, Cantero, and Bell concurring; Justices Anstead and Pariente specially concurred on other grounds).

Petitioner asks that this Court review the decision of the Florida Supreme Court granting a resentencing to Mr. Armstrong on *Johnson v. Mississippi, 486 U.S. 578 (1988)* grounds because the Florida Supreme Court has created a "per se harmful error rule." Petition for Writ of Certiorari at page 7. The Petitioner argues that relief was not warranted in this case because two contemporaneous prior violent felonies existed which it considered sufficient to overcome any

harmless error analysis.[1] The Florida Supreme Court, however, disagreed after it considered the totality of the circumstances under which Mr. Armstrong was sentenced to death.

Despite the plain statement by Justices Wells, Bell and Cantero, that the court was specifically **not** creating a per se harmful error rule, Petitioner continues to make the argument to this Court. Petitioner refuses to acknowledge that the Florida Supreme Court specifically dealt with Mr. Armstrong's case on the basis of the facts of his case as was mandated by this Court's decision *Johnson v. Mississippi*.

By the Petitioner's own admission, it acknowledged that the history of the Florida Supreme Court's rulings analyzing prior violent felony aggravating circumstances and conducting a harmless error analyses that the court has not always granted relief. See, *Owen v. State, 560 So. 2d 207 (Fla. 1987); Occhicone v. State, 768 So. 2d 1037 (Fla. 2000)* . Thus, the argument that the Florida Supreme Court has created a new "per se harmful error" rule is simply wrong.

The circumstances in Mr. Armstrong's case warranted a finding that the

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[1]The third violent felony, argued at penalty phase to support the prior violent felony aggravator, was found to be unconstitutional by the Massachusetts circuit court in 1999. There is no question that this aggravator was unconstitutional and invalid at the time of Mr. Armstrong's original trial.

jury's weighing of unconstitutional aggravators was not harmless. As Justice Wells said in his concurring opinion, "I believe a more accurate analysis is that the vacation of a prior conviction has now caused us to conclude that our confidence in the death sentence in this case is undermined that a new penalty phase is required as a matter of law." See, *Armstrong v. State*, *862 So. 2d 705 (Fla. 2003)*.

Petitioner repeatedly argues that no "undue emphasis" was placed on the prior conviction of indecent assault and battery on a fourteen year old child in its closing argument. See, Petition for Writ of Certiorari at page 8. Instead, Petitioner fails to mention that the only witnesses called on behalf of the prosecution at penalty phase were the victim, who was twenty at the time she testified at penalty phase, and the Massachusetts records custodian who testified about the certified conviction of this crime. No other witnesses were called by the prosecution. In fact, the Florida Supreme Court quoted extensively from the victim's testimony in assessing whether the admission of this unconstitutional prior conviction should be harmless error. Thus, the argument that no "undue emphasis" was placed on this unconstitutional prior violent felony is inaccurate and belied by the record.

In addition to the unconstitutional Massachusetts felony, Mr. Armstrong's penalty phase jury was not properly instructed on the other aggravating

circumstances. On direct appeal, the Florida Supreme Court acknowledged that Mr. Armstrong's jury was improperly instructed to double two aggravating circumstances and that the same jury was not allowed to consider a limiting instruction that the trial judge failed to give. *Armstrong v. State, 642 So.2d 730 (Fla. 1994).*

The Florida Supreme Court also conducted a harmless error analysis of the information before it at the time. The court found that there was "negligible" mitigating evidence admitted at penalty phase and therefore, was satisfied in finding that the instructional errors to the jury were harmless. *Armstrong v. State, 642 So.2d 730, 739 (Fla. 1994).* Petitioner made no objection at the time to the propriety or thoroughness of the Florida Supreme Court's harmless error analysis in 1994 even though the exact same analysis was used.

However, the Florida Supreme Court in 1994 did not know that one of the aggravators was unconstitutional, or that a mountain of mitigation existed but was not presented due to ineffective assistance of counsel.[2] Nor did this Florida

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[2]In a specially concurring opinion, Justices Anstead and Pariente noted that even though the majority had decided to grant a new sentencing proceeding to Mr. Armstrong on the basis of a *Johnson v. Mississippi* error, the Justices were concerned about the ineffectiveness of Mr. Armstrong's counsel for failure to investigate and prepare adequate mitigating evidence pursuant to this Court's decision in *Wiggins v. Smith, 123 S. Ct. 2527 (2003).* "Because we are remanding on separate grounds, there is no need to reach the issue of trial counsel's

Supreme Court know that *Ring v. Arizona. 536 U.S. 584 (2002)* would make proper instructions to the jury an essential element of Mr. Armstrong's trial.

Now, the Petitioner faults the Florida Supreme Court's harmless error analysis complaining that this Court should review the case on the basis of a "materiality" requirement that it perceived was not addressed in *Johnson v. Mississippi*. See, Petition for Writ of Certiorari at page 7. However, the Florida Supreme Court had already considered whether the jury's consideration of the unconstitutional Massachusetts conviction was material to the jury's decision on whether to impose death.

> In Armstrong's case, the jury considered, in support of an aggravating factor, evidence of a conviction that has since been revealed to be materially inaccurate as that conviction has been vacated. It is now clear that reliance upon that conviction to support Armstrong's sentence was erroneous under *Johnson*. Given the nature of the crime underlying the conviction–a sexual offense upon a child– and the detailed testimony given by the young victim of that crime at Armstrong's penalty phase, we cannot say that the consideration of Armstrong's prior felony conviction of indecent assault and battery on a child of the age of fourteen constituted harmless error beyond a reasonable doubt.

Armstrong v. State, 862 So.2d 705 (Fla. 2003).

Despite the Florida Supreme Court's specific statement that it found the

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investigation in this case under a *Wiggins* analysis. However, my hope is that judges and lawyers will heed the message of *Wiggins...*" *Armstrong v. State, 862 So.2d 705 (Fla. 2003).*

Massachusetts conviction to be "material" because it could not assess the impact of the victim's testimony on the jury as harmless, the Petitioner suggests that a further materiality standard needs to be enunciated by this Court. Petitioner also suggests that because two other contemporaneous felonies existed, the unconstitutional Massachusetts conviction could not possibly be harmful. But that is not what this Court has held should be the standard.

This Court held:

> ...the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. **Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate.**

Johnson v. Mississippi, 108 S. Ct at 1988 [emphasis added].

The Supreme Court made this distinction before the advent of *Ring v. Arizona, 536 U.S. 584 (2002)* which now mandates that a jury must be properly instructed because the aggravators are an element of the charged offense.

Here, the penalty phase jury did not know that the prior violent felony was unconstitutional or that Mr. Armstrong was not properly advised of his rights by his defense counsel at the time of his plea in Massachusetts. The jury was confronted not only with testimony of John Clough, Assistant Clerk Magistrate from Massachusetts, to authenticate a certified copy of Mr. Armstrong's

unconstitutional conviction for felony indecent assault and battery of a fourteen-year-old, but also graphic and emotional testimony from Rose Flynch, the alleged victim of the sexual battery. The jury considered this unconstitutional aggravating circumstance.

The Florida Supreme Court could not ignore the weight that this improper aggravator had on the jury and recognized that this inadmissible testimony could have swayed the jury to vote for death. Even given the graphic testimony of Ms. Flynch and Mr. Clough, three jurors voted against the imposition of the death penalty. The Florida Supreme Court also could not ignore that in its direct appeal opinion it had held that the prior violent felony aggravating factor was still applicable specifically because of the Massachusetts conviction. See *Armstrong v. State, 642 So.2d 730, 738 (Fla. 1994).*

The prosecution introduced only two witnesses at penalty phase and only those two testified about the Massachusetts conviction. The Petitioner now downplays the importance of these witnesses even though it went to the time and expense of transporting the victim from Massachusetts, paying for her stay in Florida and preparing her to relive the crime in front of the jury. Clearly, the prosecution believed it was worth time and effort to introduce the victim's testimony to the jury. Petitioner chose to present Ms. Flynch's testimony to

support the Massachusetts prior as an aggravating circumstance.

Petitioner also chose to present Rose Flynch's testimony on the same day the prosecutor gave his closing argument urging the jury to give Mr. Armstrong death. The prosecutor specifically referred to "the indecent assault on Rose Flynch that you have heard this morning" (R. 1933). Petitioner's claim that it did not give "undue emphasis" to the Massachusetts conviction is simply not true. It specifically chose that case and that victim to maximize the emotional impact on the jury. It cannot now pretend it would not have made a difference to the jury when it was so carefully orchestrated in the first place.

Under *Chapman v. California, 386 U.S. 18 (1967)* the State, as beneficiary of the error, is required to prove beyond a reasonable doubt that the error did not contribute to the verdict. It cannot make that claim when it brought two live witnesses to describe to the jury the circumstances of the unconstitutional aggravator in vivid detail. The other two convictions used to support the prior violent felony aggravating factor arose out of the same episode that resulted in the murder conviction. That is why the Massachusetts prior felony was so important to the prosecution. The sexual assault prior felony was the sole conviction that would show prior criminal history **before** the night of the crime. The Florida Supreme Court was correct in finding that the introduction of the unconstitutional

Massachusetts prior felony was not harmless beyond a reasonable doubt.

Finally, the Petitioner argues a number of cases to support its position that the Florida Supreme Court's decision was in conflict with a number of circuits. Petitioner cited *California v. Roy, 519 U.S. 2 (1996)* , *Romano v. Oklahoma, 512 U.S. 1 (1994)* and *Rodriquez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989)* as proof that the Florida Supreme Court's harmless error analysis was "perfunctory." See, Petition for Writ of Certiorari at pages 7-8. Yet, none of these cases deal with same factual scenario as Mr. Armstrong's case.

In *Rodriquez*, this Court dealt with a civil arbitration case in which this Court was required to decide whether a pre-dispute agreement to arbitrate claims under the Securities Act of 1933 was enforceable. There were no arbitration or securities issues present in Mr. Armstrong's case.

In *California v. Roy*, this Court was required to decide whether a trial judge's failure to give a jury instruction on an intent element of the crime was harmless. This Court held that the proper standard was to find whether the omission had a "substantial and injurious effect or influence" on the jury's verdict. Petitioner is equating a sexual assault victim's testimony to a jury on an unconstitutional prior violent felony conviction with failing to give a jury an instruction on intent in a non-capital case. The situation here is completely

distinguishable. In Mr. Armstrong's case, the jury considered the victim's testimony because it was instructed to do so, and the trial judge relied on that testimony in his order sentencing Mr. Armstrong to death. There was no question the jury considered the information. The Florida Supreme Court has already found that the unconstitutional Massachusetts conviction affected the jury verdict. Thus, *Roy* does not apply, nor is its holding contrary to the Florida Supreme Court's decision.

Finally, *Romano v. Oklahoma* explicitly rejected the notion that *Johnson* error required an automatic reversal of a death sentence based on a admission of prejudicial or irrelevant evidence. As previously stated, the Florida Supreme Court said it did not apply an automatic reversal rule in evaluating Mr. Armstrong's case. See, *Armstrong v. State, 862 So. 2d 705 (Fla. 2003)*. None of these cases demonstrate a conflict between the Florida Supreme Court's decision with other circuits on the same set of facts.

The only case remotely similar to Mr. Armstrong's case is *Spivey v. Head, 207 F.3d 1263 (11th Cir. 2000)*, in which the Eleventh Circuit Court of Appeals refused to disturb a lower court's finding of "minimal" impact of a *Johnson* violation under the *Brecht* standard.[3] Again, this case is not contrary to the

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[3]See, *Brecht v. Abrahamson, 507 U.S. 619 (1993).*

Florida Supreme Court's decision, in that the court in Mr. Armstrong's case found that the extensive testimony of the victim at penalty phase affected the outcome of the jury's decision to such an extent that confidence was undermined in the outcome. This was not the case in *Spivey* where the lower court found under the facts of Mr. Spivey's case the effect was neither substantial nor injurious.

Factual determinations made by the state court are presumed correct unless rebutted in one of eight possible ways, including the showing that the factual determination is not fairly supported by the record. 28 U.S.C. 2254 (d) (1995) (amended 1996). In Mr. Armstrong's case, the decision of the Florida Supreme Court is fairly supported by the record.

The writ should be denied.

CONCLUSION

Respondent, Lancelot Uriley Armstrong, requests that certiorari review be denied.

Respectfully submitted,

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